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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CONTINENTAL CABLEVISION
OF NEW ENGLAND, INC.,

Appeal of Local Rate Order
of the Town of Kittery, Maine.

## MEMORANDUM OPINION AND ORDER

**Adopted: July 3, 1995; Released: July 10, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On November 1, 1994, Continental Cablevision of New England, Inc. ("Continental"), the franchisee in the above-referenced matter, filed an appeal of a local rate order. The local rate order was adopted on October 18, 1994 by Continental's franchising authority, the Town of Kittery, Maine (the "Town").[1] The rate order established a new regulated rate schedule for Continental's basic service tier rate and associated equipment and installation rates.[2] Specifically, the Town's rate order requires Continental to reduce its basic service tier rate to its maximum permitted level and to issue refunds to subscribers for overcharges levied during the period from September 1, 1993 to July 14, 1994.

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

## II. DISCUSSION

### A. FCC Form 393

3. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the periodof review.

4. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from the calculation of a hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are

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[1] The Town did not file an opposition to Continental's appeal. On November 1, 1994, Continental also filed a stay request, pending Commission review of its appeal. Because we reach the merits of Continental's appeal, its stay request will be dismissed as moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] *See* 47 C.F.R. § 76.944.

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

deemed to be reasonable, as required by the 1992 Cable Act.[9] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[10]

**B. Errors in Continental's FCC Form 393**

5. In reviewing Continental's FCC Form 393, the Town determined that Continental had justified its rates for equipment and installations, but that its basic service tier rate was $0.63 above the maximum permitted rate, as calculated by Form 393. The Town ordered Continental to reduce its basic rate to the maximum permitted rate and to refund overcharges paid from September 1, 1993 to July 14, 1994 to basic subscribers. Continental contends that it mistakenly listed a channel as part of its basic service tier instead of its cable programming service (CPS) tier, where it was actually located. This, Continental continues, caused its basic service rates to be $0.63 over the maximum permitted rate, but resulted in a CPS rate that was $0.66 below the maximum permitted rate. In a letter to the Town dated September 27, 1994, Continental made the same argument and asked the Town to offset the overcharges for basic service with the alleged undercharges for CPS.[11] The Town concluded that though it would have been required to offset overcharges with undercharges from the basic service tier and equipment and installations had there been any, it lacked authority to offset refund liability between the basic and CPS tiers.

6. Under Commission's rules, cable operators have the burden of proof in demonstrating the reasonableness of existing or proposed rates for their basic service tier and associated equipment.[12] Determining whether this burden of proof has been met depends on accurate self-reporting by cable operators. Continental was therefore responsible for informing the Town that it had mistakenly reported the number of its basic service channels on its Form 393. This Continental did by letter dated September 27, 1995, three weeks before the Town adopted its local rate order. If the Town had amended Continental's Form 393 or requested an amended Form, it would not have had to reach the inter-tier offset question. Accordingly, unless the Town disputes the accuracy of Continental's correction or offers another valid reason for not accepting Continental's basic service channel count correction to its Form 393, then the Town should allow Continental to correct its mistake.[13] This issue is remanded top the Town for further proceedings consistent with this order.

**III. ORDERING CLAUSES**

7. Accordingly, IT IS ORDERED that Continental's appeal of the Town's local rate order IS REMANDED to the Town for further proceedings consistent with this order.

8. IT IS FURTHERED ORDERED that Continental's request for emergency stay IS DISMISSED.

9. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[9] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[10] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[11] Continental further states that 3182 of its 3275 customers subscribe to both the basic and CPS tiers and therefore its action in mistakenly listing a CPS channel as part of its basic service tier resulted in a "wash" to the majority of its customers. Continental does not contest the local rate order with respect to the 93 basic-only tier subscribers.

[12] 47 C.F.R. § 76.937.

[13] Although we have held that franchising authorities do not have to consider information submitted by an operator after a rate order has been issued, New England Cablevision of Massachusetts, Inc. (Amesbury, Essex, Gloucester, Manchester, Merrimac, Rockport and Salisbury, Massachusetts), DA 94-1607, ¶ ¶ 6-8 (Cab. Ser. Bur., released December 28, 1994) (*"NEC - Mass."*), or information submitted on the day a rate order is adopted, TCI Cablevision of Galesburg, Inc. (Galesburg, Illinois), DA 95-245, ¶ ¶ 6-9 (Cab. Ser. Bur., released February 16, 1995) (*"TCI - Galesburg"*), neither situation is present here. Continental alerted the Town to its alleged error over three weeks before the local rate order was adopted. Unlike the circumstances in *NEC - Mass.* and *TCI - Galesburg*, the Town here had time to consider the new information without unduly delaying its rate review process.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI CABLEVISION OF
WASHINGTON, INC.

Appeal of Local Rate Order of
Aberdeen, Washington WA0012

**ORDER**

**Adopted: July 3, 1995; Released: July 10, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On January 6, 1995, TCI Cablevision of Washington, Inc. ("TCI"), the franchisee in the above matter filed an appeal of local rate order adopted on December 7, 1994 by its franchising authority, the City of Aberdeen, Washington (the "City").[1] The local order established regulated rates for TCI's basic cable service, associated equipment and installation charges, and required TCI to issue refunds dating back to July 14, 1994. The City submitted an opposition to the appeal on January 24, 1995.[2]

2. In its review of TCI's Form 1200, the City rejected TCI's permitted rates for its basic service tier, ruling that TCI erroneously provided an entry on Line C6 of its Form 1200 ("Number of Additional Outlets in Fiscal Year 1993"), even though it did not charge for additional outlets during that period. TCI argues that by disallowing the entry for additional outlets, the City has improperly reduced TCI's maximum permitted rate. TCI also contends that the City impermissibly required TCI to calculate refunds from July 14, 1994 until the date TCI lowers its basic rate, because the City would not consider intervening cost increases which could be reflected in TCI's maximum permitted rates.

3. In its opposition, the City notes that the Commission's instructions for Line C6 of Form 1200 require that TCI enter only the number of additional outlets for which it assessed a charge. The City observes that the rate survey on which the benchmark formula relies also asked for additional outlets for which an operator charged. The City argues that TCI's reference to previous Commission rulings, in support of its argument that its refund liability may be offset by intervening rate increases, is misplaced, and that TCI has not filed a Form 1210 to justify a rate increase. In its reply, TCI argues that it is the number of additional outlets provided, rather than the separate charge for such outlets, that created the statistical relationship identified in the benchmark survey, and that fact is indicated by the benchmark formula's reliance on the number of additional outlets rather than the rate charged. TCI states that regardless whether an operator charged for additional outlets, its costs increase when it has additional outlets. TCI also argues that to require it to file for a rate increase in order to reduce its refund liability would encourage operators to file more frequently for such increases.

## II. DISCUSSION

4. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

5. FCC Form 1200 is the official form used to determine whether regulated rates for programming, equipment and installations are reasonable under the revised benchmark rules which apply to operators beginning May 15, 1994 or upon the expiration of the deferral period provided under our rules for operators to comply with the revisions to our rules.[7] Through the use of Form 1200, an operator calculates three sets of figures: (1) the operator's actual March 31, 1994 rate level; (2) the operator's March 31, 1994 benchmark rate level; and (3) the operator's "full reduction" rate level. These figures are used to derive an operator's maximum permitted rates.

6. The operator first completes Module A of the Form 1200 to calculate its March 31, 1994 per subscriber monthly regulated revenue. Next, the operator completes Module B to calculate changes in external costs which the operator is entitled to reflect in its rates but have not yet been passed through to its subscribers. In Module C the operator enters its data with respect to a number of variables to calculate its March 31, 1994 benchmark rate level on a per subscriber, per month basis. The operator's March 31, 1994

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[1] Along with its appeal of the local rate order, TCI also filed a Request for Emergency Stay on January 6, 1995. The City included an opposition to the stay request in its opposition to TCI's appeal. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b)

[3] *See* 47 C.F.R. § 76.944.

[4] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Third Order on Reconsideration in MM Docket 92-266, FCC 94-40, 9 FCC Rcd 4316, 4345 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] *See* Second Order on Reconsideration, Fourth Report and Order, Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119 (1994) (*"Second Recon. Order"*).

actual rate level (Module A plus external costs calculated in Module B) is then compared to the benchmark rate level derived in Module C, with the operator carrying forward the smaller of the two. If the March 31, 1994 actual rate level is smaller, the operator completes Module D, subtracting the monthly per subscriber equipment cost calculated in Form 1205 and adding external costs calculated from Module B. If the benchmark rate level is smaller, the operator completes Module E, subtracting the monthly per subscriber equipment cost taken from Form 1205. Depending on which is used, either Module D or E establishes per-tier rates, which the operator carries forward into Module F, as its so-called provisional rates.[8]

7. In the second part of Form 1200, the operator derives its full reduction rate based on its September 30, 1992 rates. To compute this rate, in Module G, the operator calculates its September 30, 1992 total monthly regulated revenues per subscriber, reduces that amount by 17%, and adjusts upward by 3% to reflect the inflation from September 30, 1992 until September 30, 1993. In Module H, the operator then adjusts the results from Module G for changes since September 30, 1992 with respect to subscribers, regulated channels, and satellite channels. In Module I, the operator subtracts a monthly per subscriber equipment cost amount from Form 1205, establishes per-tier rates, and adjusts for changes in external costs. In Module J, the operator compares its aggregate provisional rate with its aggregate full reduction rate. The maximum permitted rates an operator is actually allowed to charge are either the provisional rates (Module F) or the full reduction rates (Module I), depending on whether the aggregate provisional rate is greater or less than the aggregate full reduction rate, and are entered into Module K. In addition to Form 1200, an operator may file Form 1210, up to quarterly, to claim changes in external costs and inflation that justify rate increases.

**A. Line C6 of Form 1200**

8. In computing its benchmark rate level in Module C, an operator is required to provide entries for the various benchmark variables. The benchmark formula is intended to derive a rate level which approximates the level a similarly-situated operator subject to competition would charge. The benchmark rate level is determined by considering several variables, such as the number of subscribers, the number of channels, and the number of additional outlets charged, all of which affect the benchmark rate level.[9] The benchmark formula's only function in the new system is to determine which operators are "low-priced" operators subject to transition relief and therefore not required to set their rates based on their full reduction rates.[10] An operator with (i) a current, i.e., March 31, 1994, rate level below the benchmark rate level or (ii) a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark, is a low-priced operator.[11] The low-priced operator with a current rate level below the benchmark generally does not have to reduce its rate level, and the low-priced operator with a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark is required to reduce its rate level only to the benchmark.[12]

9. Included among the variables used in the benchmark formula is the number of additional outlets in fiscal year 1993, which is entered on Line C6. TCI provided an entry of 3,477 additional outlets in each 1200 filing, which was disallowed by the City because TCI did not charge subscribers for the additional outlets. The City recalculated TCI's benchmark by entering zero for the number of additional outlets on Line C6. TCI argues that it incurred a cost in providing additional outlets even though no charge was made, and that, unless it is allowed to count its additional outlets in the calculations, an operator such as itself that "bundled" its additional outlet costs into its other rates cannot charge the same rate as an otherwise identical operator that separately itemized its additional outlets.

10. Our instructions for Line C6 of Form 1200 ask the operator to provide the average monthly number of additional outlets for which there was a charge to subscribers in fiscal year 1993, and to compute the average number of additional outlets over only those months in the year for which there was a charge for additional outlets.[13] A Benchmark Fact Sheet further explaining our instructions for calculating an operator's benchmark rate restates this instruction.[14] Neither our rules, nor our instructions for completing Form 1200, permit operators to include additional outlets for which no charge is assessed on Line C6 as a benchmark variable. The City' disallowances of TCI's entry for Line C6 were in accordance with the instructions to the Form 1200.

11. TCI asserts that, under our rules, its failure to charge for a service, for which it could have charged, unfairly reduces its benchmark rate level. This is essentially an argument challenging the reasonableness of the revised benchmark formula and our rules. The revised benchmark formula is designed to approximate the rate level of a similarly-situated operator facing competition. The Commission's rate survey upon which the benchmark formula was based requested data on additional outlets for which a fee was charged.[15] The benchmark formula includes the rate survey data on charged additional outlets because we determined that this variable was statistically significant in approximating the rate level of similarly-situated operators facing competition.[16] To ensure consistency in the application of the benchmark formula, we must disallow consideration of additional outlets for which there was no charge.[17]

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[8] A small operator, i.e., an operator with 15,000 or fewer subscribers that is not affiliated with a larger operator, may keep its regulated revenue at its March 31, 1994 levels, and so is not required to complete its benchmark in Module C. Its provisional rates are determined by completion of Module D.

[9] *See Second Recon. Order*, 9 FCC Rcd at 4177-78.

[10] *See* 47 C.F.R. § 76.922.

[11] *Id.*

[12] *Id.*

[13] Instructions for FCC Form 1200, Setting Maximum Initial Permitted Rates for Regulated Cable Services Pursuant to Rules Adopted February 22, 1994 at 17.

[14] "Enter the average monthly number of additional outlets charged to subscribers in your fiscal year 1993. Include all additional residential outlets for each subscriber, other than the primary outlet. This average should be computed over just those months for which there was a charge for additional outlets." Fact Sheet, *Benchmark Fact Sheet* at 3 (Apr. 29, 1994).

[15] *See* FCC Cable TV Rate Survey, Schedules 7 and 12, Line 14 (Dec. 1992).

[16] *Second Recon. Order, Appendix C*, 9 FCC Rcd at 4278.

[17] Operators who are dissatisfied with the rates they are

12. TCI further contends that regardless of whether an operator charged for additional outlets, its costs increase when it offers additional outlets. We note that the benchmark formula provides an approximation of what a similarly-situated operator facing competition would charge. It does not indicate what costs a similarly-situated operator facing competition encounters, and so TCI's argument based on its alleged costs is misplaced. We reiterate that in individual cases where the benchmark mechanism for recovery is inadequate, operators may choose instead to file a cost-of-service proceeding.[18] Because the City's decision to disallow TCI's entry on Line C6 of Form 1200 was reasonable, we deny TCI's appeal on this issue.

**B. Calculating Refund Liability**

13. TCI next alleges that the City improperly ordered refunds for the time period "beginning July 14, 1994, until TCI's rate reductions pursuant to this order become effective."[19] TCI argues that the City's order fails to account for any intervening upward rate adjustments to which TCI would be entitled under our rules. TCI argues that based on our decisions concerning offsetting,[20] it must be credited for increases which it would have been allowed to make to its maximum permitted rates, even if it had not yet requested or implemented the rate adjustments. TCI also argues that requiring operators to file for rate increases in order to reduce their refund liability would encourage them to file more frequently for such increases.

14. Under our rules, a rate adjustment with respect to basic rates only becomes effective once it has been approved by the regulator or once the review period for such approval has lapsed.[21] An operator's per month refund liability, i.e., the difference between the amount actually charged and the permitted rate, continues at the same level until the operator reduces its actual rate or the operator, in accordance with our rules, obtains increases in its maximum permitted rate. The per month refund liability does not decrease just because the operator might be able to increase its rates but did not do so.[22] For example, if TCI's programming costs increased on December 20, 1994, but the Form 1210 subsequently filed with the local franchising authority on January 2, 1995 was not approved until March 1, 1995, TCI's maximum permitted rates could only increase on March 1, 1995. TCI's refund liability, if it had not yet reduced its rates, would be based on the difference between its actual rates and the rates established by the City's orders from July 14, 1994 through February 28, 1995. Beginning March 1, 1995, the refund would be based on the difference between TCI's actual rate and the new approved rate until the reduction is implemented or until the next increase is approved. Should TCI's rates that are approved pursuant to Form 1210 equal or exceed its current rates, no further refund liability would accrue as of the date of such approval.

15. TCI also claims that operators would increase the frequency of their filings if they cannot use intervening cost increases to offset their refund liability. We disagree. An operator has a right to file a Form 1210 when its costs increase. Cost increases cannot be recovered until an operator does so. Our decision does not change this simple fact.

16. TCI's reference to our offsetting cases, in which we have held that refund liability is computed by comparing the operator's aggregate revenues to revenues that would have been realized from maximum permitted rates, is misplaced. Those decisions hold that the franchising authority must offset any undercharges in rates against overcharges in other rates.[23] This is unrelated to the situation TCI poses here, where subsequent cost increases have occurred which it claims reduce its refund liability. Our current rules do not authorize rate increases until approved by the local franchising authority. We allow offsets of rate undercharges and overcharges which the operator has adopted in an effort to comply with our rate regulations. The refund calculation is dependent upon a comparison of permitted rates and aggregate rates during the period of review. We will not allow offsets of potential rate increases, such as those proposed by TCI here, because such increases are not permitted rates, and cannot be effective, until authorized by the local authority. Only after that approval has been obtained can the operator's refund liability be reduced. For the reasons set forth above, we find that the City's order with respect to calculation of TCI's refunds are reasonable, and therefore TCI's appeal on this issue is denied.[24]

17. Accordingly, IT IS ORDERED that TCI of Washington, Inc.'s appeal of the local rate order of Aberdeen, Washington, regarding its entry for Line C6 of Form 1200 and the City's method for determining TCI's refund liability, is DENIED.

18. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

permitted to charge under the benchmark rules have the option to submit a cost of service showing using Form 1220 or Form 1225. *See* 47 C.F.R. § 76.922(b).

[18] *First Recon. Order*, 9 FCC Rcd at 1195.

[19] Rate Order at 3.

[20] TCI cites TCI Cablevision of North Central Kentucky, DA 94-1479 (Dec. 14, 1994).

[21] 47 C.F.R. § 76.933.

[22] Operators may not set programming service rates at higher than permitted maximum rates to recover lost equipment revenues when they voluntarily price equipment rates below their maximum permitted levels. To permit operators to do so would undermine Congress's intention to create a competitive market of cable equipment providers. United Cable Television of California, Inc., DA 95-784, slip op. at para. 7 n.12 (Apr. 12, 1995). *See* Communications Act, § 624A(c)(2)(C), 47 U.S.C. § 544A(c)(2)(C); Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment, First Report and Order, 9 FCC Rcd 1981, 1982 (1994).

[23] *See* TCI Cablevision of North Central Kentucky. *See also Third Recon. Order*, 9 FCC Rcd at 4353.

[24] If, prior to TCI's implementation of its refund, the City approves a higher basic rate, we assume that the City will adjust TCI's refund liability accordingly.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI CABLEVISION OF
WASHINGTON, INC.

Appeal of Local Rate Order of
Issaquah, Washington WA0122

**ORDER**

**Adopted: July 3, 1995; Released: July 10, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On January 4, 1995, TCI Cablevision of Washington, Inc. ("TCI"), the franchisee in the above matter filed an appeal of the local rate order adopted on December 5, 1994 by its franchising authority, the City of Issaquah, Washington (the "City").[1] The local order established regulated rates for TCI's basic cable service, associated equipment and installation charges, and required TCI to issue refunds dating back to July 14, 1994. The City submitted an opposition to the appeal on February 8, 1995.[2]

2. In its review of TCI's Form 1200, the City rejected TCI's permitted rates for its basic service tier, ruling that TCI erroneously provided an entry on Line C6 of its Form 1200 ("Number of Additional Outlets in Fiscal Year 1993"), even though it did not charge for additional outlets during that period. TCI argues that by disallowing the entry for additional outlets, the City has improperly reduced TCI's maximum permitted rate. TCI also contends that the City impermissibly required TCI to calculate refunds from July 14, 1994 until TCI lowers its basic rate, because the City would not consider intervening cost increases which could be reflected in TCI's maximum permitted rates. TCI also challenges the City's determination that TCI committed a mathematical error in calculating its rates. It alleges that it is unclear what the error is, because the City failed to provide a written decision with sufficient detail. In its opposition, the City argues that its calculations with respect to the additional outlets are correct, and notes that it had met twice with TCI representatives to discuss the mathematical error identified in the rate order.

## II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

4. FCC Form 1200 is the official form used to determine whether regulated rates for programming, equipment and installations are reasonable under the revised benchmark rules which apply to operators beginning May 15, 1994 or upon the expiration of the deferral period provided under our rules for operators to comply with the revisions to our rules.[7] Through the use of Form 1200, an operator calculates three sets of figures: (1) the operator's actual March 31, 1994 rate level; (2) the operator's March 31, 1994 benchmark rate level; and (3) the operator's "full reduction" rate level. These figures are used to derive an operator's maximum permitted rates.

5. The operator first completes Module A of the Form 1200 to calculate its March 31, 1994 per subscriber monthly regulated revenue. Next, the operator completes Module B to calculate changes in external costs which the operator is entitled to reflect in its rates but have not yet been passed through to its subscribers. In Module C the operator enters its data with respect to a number of variables to calculate its March 31, 1994 benchmark rate level on a per subscriber, per month basis. The operator's March 31, 1994 actual rate level (Module A plus external costs calculated in Module B) is then compared to the benchmark rate level derived in Module C, with the operator carrying forward the smaller of the two. If the March 31, 1994 actual rate level is smaller, the operator completes Module D, subtracting the monthly per subscriber equipment cost calculated in Form 1205 and adding external costs calculated from Module B. If the benchmark rate level is smaller, the operator completes Module E, subtracting the monthly per subscriber equipment cost taken from Form

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[1] Along with its appeal of the local rate order, TCI also filed a Request for Emergency Stay on January 4, 1995. The City filed no opposition to the stay request. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b)

[3] *See* 47 C.F.R. § 76.944.

[4] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Report and Order"*); Third Order on Reconsideration in MM Docket 92-266, FCC 94-40, 9 FCC Rcd 4316, 4345 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] *See* Second Order on Reconsideration, Fourth Report and Order, Fifth Notice of Proposed Rulemaking in MM Docket

1205. Depending on which is used, either Module D or E establishes per-tier rates, which the operator carries forward into Module F, as its so-called provisional rates.[8]

6. In the second part of Form 1200, the operator derives its full reduction rate based on its September 30, 1992 rates. To compute this rate, in Module G, the operator calculates its September 30, 1992 total monthly regulated revenues per subscriber, reduces that amount by 17%, and adjusts upward by 3% to reflect the inflation from September 30, 1992 until September 30, 1993. In Module H, the operator then adjusts the results from Module G for changes since September 30, 1992 with respect to subscribers, regulated channels, and satellite channels. In Module I, the operator subtracts a monthly per subscriber equipment cost amount from Form 1205, establishes per-tier rates, and adjusts for changes in external costs. In Module J, the operator compares its aggregate provisional rate with its aggregate full reduction rate. The maximum permitted rates an operator is actually allowed to charge are either the provisional rates (Module F) or the full reduction rates (Module I), depending on whether the aggregate provisional rate is greater or less than the aggregate full reduction rate, and are entered into Module K. In addition to Form 1200, an operator may file Form 1210, up to quarterly, to claim changes in external costs and inflation that justify rate increases.

**A. Line C6 of Form 1200**

7. In computing its benchmark rate level in Module C, an operator is required to provide entries for the various benchmark variables. The benchmark formula is intended to derive a rate level which approximates the level a similarly-situated operator subject to competition would charge. The benchmark rate level is determined by considering several variables, such as the number of subscribers, the number of channels, and the number of additional outlets charged, all of which affect the benchmark rate level.[9] The benchmark formula's only function in the new system is to determine which operators are "low-priced" operators subject to transition relief and therefore not required to set their rates based on their full reduction rates.[10] An operator with (i) a current, i.e., March 31, 1994, rate level below the benchmark rate level or (ii) a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark, is a low-priced operator.[11] The low-priced operator with a current rate level below the benchmark generally does not have to reduce its rate level, and the low-priced operator with a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark is required to reduce its rate level only to the benchmark.[12]

8. Included among the variables used in the benchmark formula is the number of additional outlets in fiscal year 1993, which is entered on Line C6. TCI provided an entry of 1,326 additional outlets in each 1200 filing, which was disallowed by the City because TCI did not charge subscribers for the additional outlets. The City recalculated TCI's benchmark by entering zero for the number of additional outlets on Line C6. TCI argues that it incurred a cost in providing additional outlets even though no charge was made, and that, unless it is allowed to count its additional outlets in the calculations, an operator such as itself that "bundled" its additional outlet costs into its other rates cannot charge the same rate as an otherwise identical operator that separately itemized its additional outlets.

9. Our instructions for Line C6 of Form 1200 ask the operator to provide the average monthly number of additional outlets for which there was a charge to subscribers in fiscal year 1993, and to compute the average number of additional outlets over only those months in the year for which there was a charge for additional outlets.[13] A Benchmark Fact Sheet further explaining our instructions for calculating an operator's benchmark rate restates this instruction.[14] Neither our rules, nor our instructions for completing Form 1200, permit operators to include additional outlets for which no charge is assessed on Line C6 as a benchmark variable. The City' disallowances of TCI's entry for Line C6 were in accordance with the instructions to the Form 1200.

10. TCI asserts that, under our rules, its failure to charge for a service, for which it could have charged, unfairly reduces its benchmark rate level. This is essentially an argument challenging the reasonableness of the revised benchmark formula and our rules. The revised benchmark formula is designed to approximate the rate level of a similarly-situated operator facing competition. The Commission's rate survey upon which the benchmark formula was based requested data on additional outlets for which a fee was charged.[15] The benchmark formula includes the rate survey data on charged additional outlets because we determined that this variable was statistically significant in approximating the rate level of similarly-situated operators facing competition.[16] To ensure consistency in the application of the benchmark formula, we must disallow consideration of additional outlets for which there was no charge.[17]

11. TCI further contends that regardless of whether an operator charged for additional outlets, its costs increase when it offers additional outlets. We note that the benchmark formula provides an approximation of what a similarly-situated operator facing competition would charge. It does not indicate what costs a similarly-situated operator facing competition encounters, and so TCI's argument based on its alleged costs is misplaced. We reiterate that in

92-266, 9 FCC Rcd 4119 (1994) ("*Second Recon. Order*").

[8] A small operator, i.e., an operator with 15,000 or fewer subscribers that is not affiliated with a larger operator, may keep its regulated revenue at its March 31, 1994 levels, and so is not required to complete its benchmark in Module C. Its provisional rates are determined by completion of Module D.

[9] *See Second Recon. Order*, 9 FCC Rcd at 4177-78.

[10] *See* 47 C.F.R. § 76.922.

[11] *Id.*

[12] *Id.*

[13] Instructions for FCC Form 1200, Setting Maximum Initial Permitted Rates for Regulated Cable Services Pursuant to Rules Adopted February 22, 1994 at 17.

[14] "Enter the average monthly number of additional outlets charged to subscribers in your fiscal year 1993. Include all additional residential outlets for each subscriber, other than the primary outlet. This average should be computed over just those months for which there was a charge for additional outlets." Fact Sheet, *Benchmark Fact Sheet* at 3 (Apr. 29, 1994).

[15] *See* FCC Cable TV Rate Survey, Schedules 7 and 12, Line 14 (Dec. 1992).

[16] *Second Recon. Order, Appendix C*, 9 FCC Rcd at 4278.

[17] Operators who are dissatisfied with the rates they are permitted to charge under the benchmark rules have the option to submit a cost of service showing using Form 1220 or Form 1225. *See* 47 C.F.R. § 76.922(b).

individual cases where the benchmark mechanism for recovery is inadequate, operators may choose instead to file a cost-of-service proceeding.[18] Because the City's decision to disallow TCI's entry on Line C of Form 1200 was reasonable, we deny TCI's appeal on this issue.

**B. Calculating Refund Liability**

12. TCI next alleges that the City improperly ordered refunds for the time period "from July 14, 1994 until TCI's rate reductions pursuant to this order become effective."[19] TCI argues that the City's order fails to account for any intervening upward rate adjustments to which TCI would be entitled under our rules. TCI argues that based on our decisions concerning offsetting,[20] it must be credited for increases which it would have been allowed to make to its maximum permitted rates, even if it had not yet requested or implemented the rate adjustments.

13. Under our rules, a rate adjustment with respect to basic rates only becomes effective once it has been approved by the regulator or once the review period for such approval has lapsed.[21] An operator's per month refund liability, i.e., the difference between the amount actually charged and the permitted rate, continues at the same level until the operator reduces its actual rate or the operator, in accordance with our rules, obtains increases in its maximum permitted rate. The per month refund liability does not decrease just because the operator might be able to increase its rates but did not do so.[22] For example, if TCI's programming costs increased on December 20, 1994, but the Form 1210 subsequently filed with the local franchising authority on January 2, 1995 was not approved until March 1, 1995, TCI's maximum permitted rates could only increase on March 1, 1995. TCI's refund liability, if it had not yet reduced its rates, would be based on the difference between its actual rates and the rates established by the City's order from July 14, 1994 through February 28, 1995. Beginning March 1, 1995, the refund would be based on the difference between TCI's actual rate and the new approved rate until the reduction is implemented or until the next increase is approved. Should TCI's rates that are approved pursuant to Form 1210 equal or exceed its current rates, no further refund liability would accrue as of the date of such approval.

14. TCI's reference to our offsetting cases, in which we have held that refund liability is computed by comparing the operator's aggregate revenues to revenues that would have been realized from maximum permitted rates, is misplaced. Those decisions hold that the franchising authority must offset any undercharges in rates against overcharges in other rates.[23] This is unrelated to the situation TCI poses here, where subsequent cost increases have occurred which TCI claims reduce its refund liability. Our current rules do not authorize rate increases until approved by the local franchising authority. We allow offsets of rate undercharges and overcharges which the operator has adopted in an effort to comply with our rate regulations. The refund calculation is dependent upon a comparison of permitted rates and aggregate rates during the period of review. We will not allow offsets of potential rate increases, such as those proposed by TCI here, because such increases are not permitted rates, and cannot be effective, until authorized by the local authority. Only after that approval has been obtained can the operator's refund liability be reduced. For the reasons set forth above, we find that the City's order with respect to calculation of TCI's refunds are reasonable, and therefore TCI's appeal on this issue is denied.[24]

**C. Mathematical Error**

15. Lastly, TCI challenges the City's determination that TCI committed a mathematical error in calculating its rates, stating that the City failed to provide a written decision because it lacks "sufficient detail to explain its derivation." The City's rate order stated:

> TCI's actual rates for basic service, excluding that portion of the rate payable to the City for franchise fees, were $10.64 on 3-31-94 and $18.72 on 9-30-92. TCI's actual rates for expanded basic service, excluding that portion of the rate payable to the City for franchise fees, were $10.01 on 3-31-94 and $1.92 on 9-30-92. TCI's data for these rates reflected a mathematical error regarding franchise fee amounts.[25]

TCI's Form 1200 filing showed actual basic service rates of $10.67 on 3-31-94 and $18.78 on 9-30-92, and actual expanded basic service rates of $10.05 on 3-31-94 and $1.93 on 9-30-92.[26] The City provided no further explanation in the rate order of the purported mathematical error. In its opposition, the City states that the error was explained and discussed at two separate meetings with TCI representatives.

16. TCI correctly notes that Commission rules require that the local franchising authority issue a written decision.[27] Moreover, where the franchising authority prescribes a rate, as the City did here, the written decision must affirmatively demonstrate why the operator's proposed rate is unreasonable and why the prescribed rate is reasonable.[28] A statement by the City that a mathematical error involving franchise fees was made in TCI's rate entries, without identifying the error, much less explaining it, does not affirmatively demonstrate why TCI's rate was unreasonable. Thus, it appears from the record that the City's

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18 *Id.* at 1195.

19 Rate Order's Findings of Fact, § 2.2.

20 TCI cites TCI Cablevision of North Central Kentucky, DA 94-1479 (Dec. 14, 1994).

21 47 C.F.R. § 76.933.

22 Operators may not set programming service rates at higher than permitted maximum rates to recover lost equipment revenues when they voluntarily price equipment rates below their maximum permitted levels. To permit operators to do so would undermine Congress's intention to create a competitive market of cable equipment providers. United Cable Television of California, Inc., DA 95-784, slip op. at para. 7 n.12 (Apr. 12, 1995). *See* Communications Act, § 624A(c)(2)(C), 47 U.S.C. § 544A(c)(2)(C); Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment, First Report and Order, 9 FCC Rcd 1981, 1982 (1994).

23 *See* TCI Cablevision of North Central Kentucky. *See also Third Recon. Order*, 9 FCC Rcd at 4353.

24 If, prior to TCI's implementation of its refund, the City approves a higher basic rate, we assume that the City will adjust TCI's refund liability accordingly.

25 Petition, Attachment A at 5.

26 Petition, Attachment B at 2 and 6.

27 47 C.F.R. § 76.936; *Rate Order*, 8 FCC Rcd at 5715-16.

28 *Rate Order*, 8 FCC Rcd at 5723.

rate order did not comport with our rules in this area.[29] We therefore remand this case for further proceedings not inconsistent with this decision.

17. Accordingly, IT IS ORDERED that TCI of Washington, Inc.'s appeal of the local rate order of Issaquah, Washington, regarding its entry for Line C6 of Form 1200 and the City's method for determining TCI's refund liability, is DENIED.

18. IT IS FURTHER ORDERED that the City of Issaquah, Washington's local rate order is REMANDED with respect to its finding of a mathematical error in TCI of Washington, Inc.'s Form 1200.

19. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[29] *See* A-R Cable Services-ME, Inc., DA 95-75 (Jan. 20, 1995).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-137**

In the Matter of

Amendment of Section 73.202(b), RM-7494
Table of Allotments,
FM Broadcast Stations.
(Saltville, Virginia and
Jefferson, North Carolina)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: June 30, 1995; Released: July 10, 1995**

By the Chief, Allocations Branch:

1. At the request of 106.1, Inc. ("petitioner"), permittee of Channel 291A, Saltville, Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 2594 (1991), proposing the substitution of Channel 291C3 for Channel 291A at Saltville, Virginia and the reallotment of Channel 291C3 from Saltville to Jefferson, North Carolina; and modification of petitioner's construction permit to specify Jefferson as its community of license. Petitioner filed comments reiterating its intention to apply for Channel 291A at Jefferson. Murray Communications ("Murray"), and Evelyn Holt Parker, applicants for Channel 290A at Colonial Heights, Tennessee, filed opposing comments.[1] Caddell Broadcasting, Inc. ("Caddell"), licensee of Station WKSK(AM), West Jefferson, North Carolina, and Smith Communications ("Smith"), licensee of Station WZJS-FM, Banner Elk, North Carolina, filed comments. Reply comments were filed by petitioner, Caddell and Smith.

2. Petitioner states its proposal would permit a more efficient use of the FM spectrum by providing Jefferson, the county seat of Ashe County, with its first local aural transmission service, while Saltville will retain local service from AM Station WXMY. Petitioner contends that Saltville will continue to be well-served since the community will receive service from 6 FM stations. Furthermore, petitioner argues that adoption of its proposal will enable it to provide service to 91,654 persons instead of 26,574 persons.

3. In opposition, Smith contends that adoption of petitioner's proposal is inconsistent with the Commission's long standing allotment policies. Smith states that the deletion of the Saltville allotment will deprive that community of its only opportunity for a full-time local transmission service, while providing a second aural transmission service to Jefferson. Smith argues that Jefferson is already served by Station WKSK-AM which is licensed to West Jefferson, North Carolina. Smith further states that West Jefferson and Jefferson boundaries practically abut and, when combined, represent a single community. Smith contends that West Jefferson and Jefferson historically developed interdependently noting that Jefferson formed around the county government while West Jefferson formed around the railroad. Smith asserts that this interdependent but specialized relationship continues today, with Jefferson providing the county government and West Jefferson serving as the primary business center. Smith believes adoption of petitioner's proposal would allow petitioner to circumvent the rules and challenges from competing applicants which is against the Commission's revised rules, citing *Amendment of Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870, 66 RR 2d 877 (1989). Finally, Smith states that following the guidelines of Section 307(b) of the Communications Act, Saltville, Virginia, is the preferred allotment because it would provide a first full-time service to twice as many people as the allotment to Jefferson.[2] Smith also

[1] Murray and Parker's comments concern the short-spacing conflict between their pending applications for a new FM station on Channel 290A at Colonial Heights, Tennessee, and petitioner's proposal for the reallotment of Channel 291A to Jefferson, North Carolina. Both parties proposed alternate coordinates for Channel 291A at Jefferson. However, a Commission engineering analysis has determined that there may be a line-of-sight problem to Jefferson from either Murray or Parker's proposed sites, thus neither alternate sites will be considered. Furthermore, we note that Murray and Parker's applications were filed prior to the effective date of *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. pend.* As such, we will follow established Commission policy, which states that rulemaking proposals which provide new service benefits are generally preferred over an application which represents a preference for a particular site. *See Audalusia, Alabama*, 49 FR 32201, published August 13, 1984, and *Rocky Mount, North Carolina*, 6 FCC Rcd 2153 (1991). Since the time this *Notice* was issued, Murray's application (File No. BPH-900220MM) was granted pursuant to the Settlement Agreement between Murray, Parker and Sullivan County Broadcasting. Subsequently, the Commission's staff found an alternate site to accommodate petitioner's proposal while protecting the coordinates specified in Murray's construction permit. This change is consistent with Commission new policy to attempt, where possible, to eliminate conflicts between coordinates specified by parties. We do not believe that this is unduly burdensome to petitioner since it has proposed a change of transmitter site in its rulemaking petition.

[2] Smith disputes petitioner's claim that its proposal will provide service to 91,654 people in an area of 4698.4 square miles, while as a Class A, the Saltville allotment will serve only 26,574 persons in an area of 1135.5 square miles. Smith argues that the Commission's standard prediction method using F (50,50) curves does not accurately predict service coverage. Smith states that when the area's mountainous, irregular terrain is considered, petitioner's proposal would only serve 19,827 persons in an area of 1025 square miles. Smith states that it has used the propagation prediction method commonly known as Tech Note 101 *see*, (P.L. Rice, A. G. Longley, K. A. Norton, and A. P. Barsis, "Transmission Loss Predictions for Tropospheric Communications Circuits". NBS Technical Note 101, first published in 1965 by National Bureau of Standards), to predict population coverage at Jefferson. However, the Commission has not sanctioned use of alternate propagation methodology for comparison of population coverage areas and Smith has not presented a persuasive showing as to why such methodology should be permitted now. Therefore Smith's comments regarding population coverage areas will not be discussed.

contends that petitioner's stated objectives[3] can be achieved without removing Channel 291A from Saltville. Smith suggests possible allotments to Emory, Damascus, Chilhowie and Glade Springs, Virginia, would truly provide a first local service to these communities rather than a "substitute" nearby aural service to Jefferson.[4]

4. In its comments, Caddell agrees with Smith's contention that West Jefferson and Jefferson are one community. Caddell states that West Jefferson and Jefferson share governmental, educational, social, political, religious and business institutions, noting the county hospital is in Jefferson while the county's Chamber of Commerce is in West Jefferson. Caddell contends that the citizens of Jefferson and West Jefferson think of themselves as a single community and are currently proposing a new water system for "their community". Caddell states that both Saltville and Jefferson are currently served by AM daytimers[5] and adoption of petitioner's proposal would represent a second aural transmission service to Jefferson while removing Saltville's first full-time local service. Caddell states the reallotment of Channel 291A to Jefferson should be denied since it would not result in providing a first local transmission service or service to a greater number of people. In conclusion, Caddell urges the Commission to afford Caddell the opportunity to compete for the new FM channel at Jefferson, if allotted.

5. In reply comments, petitioner reiterates that the reallotment of Channel 291A to Jefferson would provide the community with its "first local service", while Station WXMY-AM would continue to provide local service to Saltville. Petitioner contends adoption of its proposal would provide service to larger population. Petitioner submits that Saltville could be described as a "dying community", noting that Saltville has had a declining population for the past twenty years.[6] Petitioner refutes Smith and Caddell's contention that Jefferson and West Jefferson are one community, noting it is a common practice for two rural towns to share services. Petitioner states the fact that Jefferson is adjacent to West Jefferson is not basis to deny an allotment to an underserved area. Petitioner further argues that while Station WKSK-AM is licensed to West Jefferson, the Commission has long held that reception service from nearby stations is not a substitute for local service, citing *Clinton, Louisiana*, 45 R.R 2d 1587 (1979) and *Westover and Grafton, West Virginia*, 46 FR 10737 (1981). Petitioner contends the reallotment of Channel 291C3 to Jefferson would give the community its first local service, while AM Station WXMY would continue to provide local service to Saltville.

6. In reply comments, Smith and Caddell argue that adoption of petitioner's proposal would not provide a first local service to Jefferson, but would instead constitute a second local service to Jefferson. Smith contends Saltville is the preferred allotment because retention of Channel 291A would provide first full-time local service to twice as many people as the proposed Channel 291C3 allotment at Jefferson.

7. *DISCUSSION.* After careful analysis of the pleadings submitted in this proceeding, we believe that the public interest would be best served by adopting petitioner's request. First, we find that Jefferson is a separate community from West Jefferson. Based on Smith and Caddell's contentions that Jefferson and West Jefferson are one community, we inquired at the State Library of North Carolina and the Chamber of Commerce for West Jefferson, North Carolina, regarding the status of Jefferson. These sources confirmed that Jefferson and West Jefferson are two separate communities, each having separate city governments, as well as separate municipal services. In addition, Jefferson and West Jefferson are listed as separate incorporated communities in 1990 U.S. Census.

8. We reject Caddell's suggestion that if the Commission grants petitioner's proposal it should afford Caddell the opportunity to compete for the new FM allotment at Jefferson. The Commission has stated that the public interest, convenience and necessity would best be served by allowing permittees and licensees the opportunity to change their community without being subject to competing applications.[7] The Commission determined that allowing third parties to file competing applications for such new allotments acts as powerful disincentive because of the attendant risk that the incumbent station could lose its authorization to broadcast in a comparative hearing. Caddell has given no sufficient reason to abrogate this policy.[8]

9. In respect to the merits of petitioner's proposal, we find the request meets the three requirements necessary to obtain a change of community of license pursuant to Section 1.420(i).[9] That is, the proposal is mutually exclusive with Channel 291A at Saltville, plus the reallotment will not remove the sole local transmission service from

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[3] In addition to those objectives already noted, petitioner states adoption of its proposal would also eliminate the short-spacing restriction with Bluefield, Virginia.

[4] According to Commission' records, no petition for rule making or counterproposal seeking FM allotments to the above-noted communities has been filed. Furthermore, no party has expressed an interest in an allotment to any of the noted communities. A showing of continuing interest is required before a channel can be allotted, and absent such an expression of interest, it is Commission's policy to refrain from allotting the channel. *See e.g., Murray, Kentucky*, 3 FCC Rcd 3016 (1988) and *Pine, Arizona*, 3 FCC Rcd 1010 (1988). Therefore, Smith's allotment scheme is without merit.

[5] Those stations include WXMY-AM, Saltville, Virginia, and WKSK-AM, West Jefferson, North Carolina.

[6] Petitioner submits that when looking at the two communities, over the period from 1970 to 1980, Saltville experienced a decline of 6.0% in population in contrast to an increase 15.1% over the same period at Jefferson. In the time period from 1960 to 1970, petitioner states that Saltville lost 11.2% of its population.

[7] The Commission's rules provide that a licensee or permittee may petition the Commission for an amendment to the FM and television tables of allotments, and modification of its license accordingly, without placing its existing authorization at risk. This procedure is limited to situations in which the new allotment would be mutually exclusive with the existing allotment and does not apply to nonadjacent channel upgrades.

[8] *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order*, 5 FCC Rcd 7094, (1990)).

[9] The three requirements are (1) the new allotment must be mutually exclusive with the existing allotment, (2) the allotment to the new community must better serve the Commission's allotment priorities and policies than maintaining the allotment to the existing community, and (3) the change must not deprive a community of its sole existing broadcast station. *See Community of License R&O*, 4 FCC Rcd at 4873-4874.

Saltville (population 2,300), as AM Station WXMY will remain in the community. Jefferson (population 1,300), which is not in an Urbanized Area, will receive its first local aural transmission service, thus conforming with the Commission's preferential arrangement of allotment priorities.[10] Our engineering analysis indicates that the reallotment of Channel 291C3 at Jefferson, North Carolina, will enable petitioner to provide service to an additional 148,117 persons.[11] We recognize that the removal of Channel 291A from Saltville will create a reception service loss area of 19,798 persons who will continue to receive at least five full-time aural reception services; some 953 persons will receive four full-time aural reception services and 159 persons will receive three reception services. While we carefully consider any proposal that would result in a loss of existing reception service, we note that the Saltville station is not built, thus, we do not consider its removal from Saltville to represent the same concerns with loss of service than removal of an operating station would represent, since it is not a service on which the public has come to rely. *See Pawley's Island and Atlantic Beach, South Carolina*, 8 FCC Rcd 8657, (1993). We believe the public interest is served by this proposal, since it will provide a first local service to Jefferson and will provide additional reception service to over 148,117 persons.

10. Channel 291C3 can be allotted to Jefferson in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.3 kilometers (5.2 miles) northeast to avoid a short-spacing conflict with a construction permit for Station WLJQ-FM, Channel 290A, Colonial Heights, Tennessee.[12] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the construction permit for petitioner's station at Saltville, Virginia, to specify Jefferson, North Carolina, as its community of license on Channel 291C3, in lieu of its use at Saltville, Virginia.

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 24, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Saltville, Virginia | – |
| Jefferson, North Carolina | 291C3 |

12. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of 106.1, Inc. for a new FM station at Saltville, Virginia IS MODIFIED to specify operation on Channel 291C3 at Jefferson, North Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

13. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, 106.1, Inc., permittee of a new FM station, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[10] The FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). Furthermore, we need not address the issues raised by Smith and Caddell regarding the FM priorities, since we have determined that Jefferson is a separate community.

[11] We note the Commission's gain population figures are different than those figures submitted by petitioner. Petitioner contends that Channel 291A at Saltville will serve 26,574 persons and Channel 291C3 at Jefferson will provide service to 91,654 persons. We find petitioner's study is based on projected contours using actual terrain, in which the shape of the contour varies as HAAT along each pertinent radial. However, the Commission's engineering study is based on idealized conditions which results in a perfect circle for the contour. This difference in methodology accounts in part for the variation in figures.

[12] The coordinates for Channel 291C3 at Jefferson are North Latitude 36-28-46 and West Longitude 81-24-41.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-69**

In the Matter of

Amendment of Section 73.202(b), RM-8106
Table of Allotments,
FM Broadcast Stations.
(San Carlos and Oracle, Arizona)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: June 29, 1995; Released: July 10, 1995**

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making and Order to Show Cause* (*"Notice"*), 8 FCC Rcd 2241 (1993), issued in response to a petition filed by Desert West Air Ranchers Corporation ("petitioner"), permittee of Station KCDX(FM),[1] Channel 279A, San Carlos, Arizona, proposing the substitution of Channel 276C2 for Channel 279A and modification of its authorization accordingly. To accommodate its proposal, petitioner also requested the substitution of Channel 279A for Channel 276A at Oracle, Arizona, and modification of the license for Station KLQB(FM), Channel 276A. Petitioner filed supporting comments in response to the *Notice*.[2] In response to the *Order to Show Cause*, an unacceptable counterproposal and reply comments were filed by Golden State Broadcasting Corporation ("Golden State"), licensee of Station KLQB(FM), Oracle, Arizona, to which petitioner responded.[3]

2. In its comments petitioner reaffirms its interest in the Channel 276C2 upgrade at San Carlos and the modification of its authorization for Station KCDX(FM).

3. In light of the rejection of Golden State's counterproposal, *supra*, and in the absence of a substantial or material question of fact having been raised by it in response to the *Order to Show Cause*, or a demonstration that Station KLQB(FM) would be unduly harmed by the modification of its license to specify operation on Channel 279A at Oracle, Arizona, we believe the public interest would be served by granting petitioner's modification request. Therefore, we will substitute Channel 276C2 for Channel 279A at San Carlos, and modify the authorization of Station KCDX(FM) accordingly, to specify operation on the higher powered channel. The modification of Station KCDX(FM) at San Carlos will afford Station KLQB(FM) an opportunity to operate at maximum Class A facilities at Oracle, a benefit not presently available to it. Therefore, we will substitute Channel 279A for Channel 276A at Oracle, Arizona, and modify the authorization for Station KLQB(FM) accordingly, since it could provide an expanded service to that community. Channel 279A can be used by Station KLQB(FM) at its current location.

4. Commission policy requires reimbursement to affected licensees or permittees for reasonable costs associated with changing frequencies. *See, Circleville, Ohio*, 8 FCC 2d 159 (1967). Petitioner has stated its intention to reimburse Station KLQB(FM) for the reasonable costs related to the Class A frequency change at Oracle.

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[1] Formerly Station KOYF(FM). The call sign change was effective May 24, 1993.

[2] As stated in the *Notice*, although petitioner's request was signed and its address given, it did not verify the statements contained in the petition as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the noted deficiency in its responsive comments, and has complied accordingly.

[3] Golden State requested the substitution of Channel 276C2 for Channel 276A at Oracle. In order to accommodate the upgrade at Oracle, Golden State also requested the substitution of Channel 275A or Channel 277A for vacant and unapplied for Channel 276A at Comobabi, Arizona. A staff engineering analysis has determined that Channel 276C2 at Oracle would be short-spaced to vacant Channel 276B, Cananea, Sonora, Mexico, by 52.3 kilometers (32.5 miles) under the terms of the 1972 U.S./Mexican Agreement ("1972 Agreement") and by 49.3 kilometers (31 miles) under the terms of the 1992 U.S./Mexican Agreement ("1992 Agreement"), at coordinates 30-58-57 and 110-18-01. Furthermore, Golden State's requested substitution of Channel 275A for Channel 276A at Comobabi, Arizona, is short spaced to Station XHQT-FM, Channel 274B, Nogales, Sonora, Mexico, by 10.7 kilometers (6.6 miles) under the terms of the 1992 Agreement and by 55.7 kilometers (34.6 miles) under the terms of the 1972 Agreement, at coordinates 31-19-10 and 110-57-06. Likewise, requested Channel 277A at Comobabi is short spaced to Station XHRZ-FM, Channel 278B, Nogales, Sonora, by 10.2 kilometers (6.3 miles) under the terms of the 1992 Agreement and by 55.2 kilometers (34.3 miles) under the terms of the 1972 Agreement, at coordinates 31-19-28 and 110-56-47.

Additionally, in order to accommodate its proposal, Golden State requested the deletion of Channel 276B, Cananea, Sonora, Mexico. However, it is the Commission's policy not to request the deletion of foreign allotments.

Golden State's proposal was filed prior to the June 2, 1995, effective date of the 1992 Agreement, and therefore, it has been considered under the terms of the 1972 Agreement.

Also, neither of the requested Class A channel substitutions at Comobabi, Arizona, complies with the minimum distance separation requirements of Section 73.208(b)(3) of the Commission's Rules. Effective October 2, 1989, Class A channel allotment requests must specify maximum operating facilities (*i.e.*, 6 kilowatts effective radiated power (ERP) with a maximum height above average terrain (HAAT) of 100 meters (328 feet)). *See, Second Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), *recon.*, 6 FCC Rcd 3417 (1991). Moreover, pursuant to the provisions of the 1972 and the 1992 Agreements, a Class A, 6 kilowatt channel is treated as a Class B or AA channel respectively. Additionally, the requested deletion of Channel 276B at Cananea, Sonora, Mexico, cannot be accommodated under the minimum distance separation requirements of either the 1972 or the 1992 Agreements.

In view of the enumerated deficiencies, Golden State's counterproposal was not placed on Public Notice.

**Technical Statement**

5. As indicated in the *Notice*, Channel 276C2 can be substituted for Channel 279A at San Carlos consistent with the minimum distance separation requirements of the Commission's Rules, at the petitioner's currently authorized site, located 27.2 kilometers (16.9 miles) west of the community at coordinates 33-23-13 and 110-44-25. Additionally, Channel 279A can be substituted for Channel 276A at Oracle at the licensed site of Station KLQB(FM) at coordinates 32-37-07 and 110-47-20. As San Carlos and Oracle are each located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government in this proposal was obtained.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 24, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

| City | Channel No. |
|---|---|
| San Carlos, Arizona | 276C2 |
| Oracle, Arizona | 279A |

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the authorization of Desert West Air Ranchers Corporation (File No. BPH-910516ML) for Station KCDX(FM), San Carlos, Arizona, IS MODIFIED to specify operation on Channel 276C2 in lieu of Channel 279A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Golden State Broadcasting Corporation (File No. BLH-900809KC) for Station KLQB(FM), Oracle, Arizona, IS MODIFIED to specify operation on Channel 279A in lieu of Channel 276A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KLQB(FM)'s license (File No. BLH-900809KC), except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BLH-900809KC, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Desert West Air Ranchers Corporation, permittee of Station KCDX(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at San Carlos, Arizona.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KLQB(FM), as follows: Golden State Broadcasting Corporation, P.O. Box 26040, Tucson, Arizona 85726.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-86**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8497 |
| Table of Allotments, | RM-8548 |
| FM Broadcast Stations. | |
| (Klamath Falls, Altamont and Butte Falls, Oregon, and Dorris, California)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: June 29, 1995; Released: July 10, 1995**

By the Chief, Allocations Branch:

1. At the request of Terry A. Cowan ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3584 (1994), proposing the allotment of Channel 284C1 to Klamath Falls, Oregon, as the community's fourth local FM service. Counterproposals were filed by Western States Broadcasting, Inc. ("WSB"), and Goldrush Broadcasting ("Goldrush").[2] Comments were filed by the petitioner reiterating his intention to apply for the channel at Klamath Falls, if allotted. Reply comments were filed by the petitioner, WSB,[3] KMED Radio ("KMED") and DRB Medford License, Inc. ("DRB Medford").

2. WSB is the permittee of Station KCHQ(FM), Channel 249C1, Altamont, Oregon. In its counterproposal, it requests that Station KCHQ(FM)'s construction permit be modified to specify Butte Falls as the station's community of license and that its operating frequency be downgraded from Channel 249C1 to Channel 249C2. WSB states that the change of community would serve the public interest since it would provide a first local aural service to Butte Falls and enable Station KCHQ(FM) to bring a new service to approximately 175,000 people. WSB argues that, in contrast, the allotment of Channel 284C1 to Klamath Falls only would provide the community with its fourth local FM and seventh aural service and bring a new service to approximately 56,000 people. Acknowledging that the deletion of Channel 294C1 from Altamont would result in the deletion of the community's sole local aural service, WSB requests that Channel 284C1 be allotted to Altamont as a replacement for Channel 249C1 and states its intention to apply for the channel, if allotted to Altamont.

3. In opposition, petitioner submits that WSB's counterproposal cannot be considered as *bona fide* but rather an abuse of the Commission's processes. Petitioner points out that WSB is the licensee of Station KWSA(AM), West Klamath Falls, and permittee of Station KCHQ(FM), Altamont. However, pursuant to the request of WSB stating that it is experiencing both "severe financial problems" and "equipment problems,"[4] the Commission has permitted both of these stations to be silent for many months. Further, petitioner states that although WSB petitioned for, and in 1992 was granted, the modification of Station KCHQ(FM)'s construction permit to operate on Channel 249C1 in lieu of Channel 267C, WSB has yet to file a construction permit specifying the new channel and facilities.[5] The petitioner states that in order for WSB to pursue the Altamont and Butte Falls stations, it must pay a Form 301 filing fee of $2,335 for each allotment, plus many thousands of dollars for the construction of towers, purchase or lease of transmitter sites, purchase or lease of studios, as well as purchase or lease of equipment such as transmitters, antennas and studio equipment. In the case of the Butte Falls allotment, WSB would also be required to pay a rule making fee of $1,800. Since WSB has stated that it is experiencing continuing financial difficulties of such an extent that it cannot return either of the stations it is already authorized to operate on the air, petitioner argues that its statement of intent to file applications for Channels 249C2 at Butte Falls and 284C1 at Klamath Falls must be viewed as "patently unreliable."[6]

4. Petitioner also disputes the need of Butte Falls for a local radio service. He states that Butte Falls has a 1990 U.S. Census population of only 252 persons and is little more than a crossroads. As to Altamont, petitioner states that the U.S. Census considers Altamont to be a CDP with a 1990 population approximately the same as Klamath Falls. However, he appends a letter from the Klamath County Chamber of Commerce which states that Altamont has no post office or governmental structure of its own and, in fact, is referred to today as the "South Suburbs" by local residents.

5. Finally, petitioner submits that both requests can be accommodated if the Commission does not reject WSB's counterproposal. He states that there is no technical bar to

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[1] The communities of Altamont and Butte Falls, Oregon, and Dorris, California, have been added to the caption.

[2] Public Notice of the filing of WSB's counterproposal was given on November 18, 1994, Report No. 2041. Goldrush's counterproposal to allot Channel 284C3 to Dorris, California, is late-filed and therefore not accepted for consideration.

[3] After the time for filing comments and reply comments, WSB filed a Response to the petitioner's reply comments. Petitioner filed a Motion to Strike WSB's Response as an unauthorized pleading. The Commission generally does not accept for consideration pleadings submitted after the deadline for filing reply comments. However, where, as here, a counterproposal is put on public notice, the Commission considers this to be an extension of the reply comment period. *See, Corinth, Hadley and Queensbury, NY*, 2 FCC Rcd 3316 (1987). Therefore, since these comments are timely filed pursuant to the response time set forth in the public notice announcing WSB's counterproposal, we will consider WSB's Response to petitioner's reply comments.

[4] *See* Letter of July 29, 1994, from William L. Zawila, President, Western States Broadcasting, Inc.

[5] *See* MM Docket 91-341, 7 FCC Rcd 4599 (1992). Although WSB had requested the substitution of Channel 243C1 for Channel 267C, the Commission allotted Channel 249C1 to accommodate other proposed allotments. However, Channel 249C1 was allotted at the reference coordinates proposed by WSB.

[6] The latest request of WSB for Stations KWSA(AM) and KCHQ(FM) to remain off-the-air was filed with the Commission on February 6, 1995.

the allotment of Channel 249C2 at Butte Falls and Channel 284C1 at Klamath Falls. However, Channel 284C1 cannot be allotted to both Altamont and Klamath Falls as the communities are located only approximately 5 kilometers apart. However, petitioner contends that the Commission, in this case, can delete Channel 249C1 from Altamont without replacement. He notes the Commission's prohibition against the removal of a community's sole local broadcast service but argues that in this case the relevant community from which Station KCHQ(FM) is being removed is Klamath Falls, not Altamont, even if the Commission should find that Altamont is a separate and independent place. In support, petitioner states that in *Huntington Broadcasting Co. v. FCC*, 192 F. 2d 33 (D.C. Cir. 1951), the court affirmed the Commission's finding that one community did not deserve a Section 307(b) preference over another where the facilities proposed by each prospective licensee were so powerful that the service would be regional in character and would substantially cover the entire metropolitan area in which both cities were located. In this case, petitioner states that since a Class C1 channel allotted to either Altamont or Klamath Falls would serve substantially the same wide area, the relevant community is Klamath Falls, the center of the metropolitan area, and not the suburb of Altamont. Petitioner contends that WSB would not be harmed if Channel 284C1 is allotted to Klamath Falls instead of Altamont since it will be able to apply for the channel.

6. KMED, licensee of Station KMED(AM), Gold Hill, Oregon, opposes the allotment of Channel 249C2 to Butte Falls. It states that since the community has a population of only approximately 425 persons,[7] the station will primarily serve populations outside the city in other areas of Jackson County. KMED states that if Channel 249C2 is allotted to Butte Falls, it will constitute the fourth new FM allotment to Jackson County in the past three years. However, Jackson County, with a population of 153,000 persons, already receives service from 10 commercial FM, 2 noncommercial FM, 6 commercial AM and 2 noncommercial AM stations, for a total of 19 radio stations. In addition, there are two allotments which are not yet on the air, thus raising the total to 21 services. KMED states that AM stations in small markets like Jackson County can only survive by programming a niche format since they cannot compete with FM stations on signal quality. However, with the addition of so many FM stations, KMED contends that both AM and FM stations have difficulty in finding a niche. It argues that the addition of another FM station will come at the "expense of the already battered AM operators" which is not in the public interest.

7. DRB Medford, licensee of Stations KROG(FM), Phoenix, Oregon, and KBOY(FM), Medford, Oregon, also opposes WSB's counterproposal. DRB Medford disputes WSB's claim that its proposal to allot Channel 249C2 to Butte Falls and modify Station KCHQ(FM)'s construction permit to specify Butte Falls in lieu of Altamont as its community of license complies with the Commission's Rules. It states that WSB's proposal would result in the removal of Altamont's sole local broadcast service in contravention of the Commission's decision in *Modification of FM and TV Authorizations to Specify a New Community of License* (*"Modification R&O"*), 4 FCC Rcd 4870 (1989) (*"Modification MO&O"*), 5 FCC Rcd 7094 (1990). WSB states that the Commission, in the *Modification MO&O*, said that the public has a "legitimate expectation" that they will continue to receive existing service and thus only in "rare circumstances" would a waiver of this presumption be considered. Further, DRB Medford states, the Commission went on to say that the provision of a new local service would not be, by itself, sufficient justification to warrant the removal of an existing service, particularly the only authorized service to the community. DRB Medford also points out the Commission statement that the replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered, did not adequately cure the disruption to existing service occasioned by the removal of an existing service.

8. DRB Medford characterizes WSB's proposal as disregarding the public interest rights of Altamont to retain its existing authorization for local service. It states that Altamont is the largest community in Klamath County and the largest community in Oregon outside of a metropolitan area to have only one local radio station. DRB Medford points out that there is no hard and fast rule to apply in determining whether a particular population grouping constitutes a community for allotment purposes, citing *Declaratory Ruling Concerning the Meaning and Effect of Section 73.642 (a)(3)*, 55 FCC 2d 187, 189 (1975). While acknowledging that Butte Falls is incorporated, DRB Medford contends that its status as a community for allotment purposes is ambiguous, stating that it clearly does not have the characteristics of a bona fide community. First, it states that Butte Falls is a small community with a declining population, having gone from a high in population of 428 persons in 1980 to a low of 252 persons in 1990, according to the U.S. Census. Further, it states that WSB, other than noting that Butte Falls is incorporated, provides no data demonstrating that Butte Falls has the characteristics which might otherwise qualify it as a community for allotment purposes, only stating that the allotment would provide a new service to 175,000 persons. Since this population figure is representative of the population within the Medford Standard Metropolitan Statistical Area ("SMSA"), DRB Medford contends that WSB's real purpose is to provide a eighth Class C facility to the Medford-Jackson County radio market.

9. DRB Medford argues that the Commission cannot consider the allotment at Butte Falls to be a first local service in light of the policies set forth in *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990) and *Faye and Richard Tuck*, 3 FCC Rcd 5375 (1990). It states that these cases hold that where the suburban station would provide service to a metropolitan area and the population of the suburban community is relatively small, it is within the urbanized area and exhibits a high degree of interdependence with the central city, the Commission is generally disinclined to grant a first local service preference to the suburban community. Here, Butte Falls is located within the Medford Urbanized Area and has a population of 252 persons while that of Medford itself is almost 47,000 persons. DRB Medford goes on to point out that the population of Altamont, the largest community in Klamath County, is 18,591 persons. It states that WSB ignores the disparity in the populations, provides no justification for the deletion of the only

[7] No source for the population figure is given.

presently authorized service to Altamont and fails to point out that Butte Falls receives service from no less than eight AM and nine FM stations.

10. Like the petitioner, DRB Medford also contends that WSB's statement of intent to file for the Butte Falls and Altamont allotments cannot be considered as *bona fide* based on the performance of WSB or its controlling principal, William Zawila, in at least four instances. DRB Medford states that WSB was issued a construction permit in 1988 for an Altamont Class C facility specifying 100 kW power at 882 feet above average terrain. However, when WSB sought to have the facility licensed in 1991, DRB Medford states that the Commission found the station to be operating illegally with reduced power and with an unauthorized booster station. Subsequently, in 1991, WSB petitioned for and was granted a change of channel to permit the station to relocate to Chase Mountain to improve coverage. However, to date no application to effectuate this change has been filed. According to DRB Medford, construction permits have also been issued to companies which Zawila controls for stations at Coalinga, California (KNGS(FM)), Templeton, California (KXER(AM)), and Earlimart, California (KNKD(FM)) but that none of these stations have built.[8] WSB's commitment to apply for the Butte Falls/Altamont channels is further undercut, according to DRB Medford, by WSB's statement that it cannot return Stations KWSA and KCHQ(FM) to operation due to continuing "severe financial" problems. DRB Medford believes that there is little likelihood that WSB will overcome its financial difficulties, stating that electrical power has been cut off to its studios, equipment apparently repossessed and personal property taxes in excess of $12,000 unpaid since July 1992.

11. WSB, in response to petitioner's opposition, again states that the counterproposal better serves the public interest since it would provide a first local aural transmission service to Butte Falls while retaining a Class C1 service at Altamont as opposed to the provision of a seventh local aural transmission service at Klamath Falls. WSB acknowledges that it is presently experiencing financial difficulties but argues that this fact is irrelevant to this proceeding, contending that the counterproposal fully complies with the Commission's allotment policies and rules. It argues that petitioner is erroneously assuming that because WSB has financial difficulties at this time that it will continue to have such problems in the future. As to whether Butte Falls and Altamont are deserving of FM allotments, WSB states that Butte Falls is an incorporated city with its own "local governmental structure and a clearly identifiable population group in the State of Oregon" and that the Commission has already recognized the existence of Altamont with the licensing of Station KCHQ(FM) to that community.

## DISCUSSION

12. After careful review of the pleadings before us, we find that the public interest would not be served by the grant of WSB's counterproposal. WSB seeks to change Station KCHQ(FM)'s community of license from Altamont to Butte Falls by deleting the only local service from Altamont, a community of 18,591 persons, to provide a first local service to Butte Falls, a community of only 252 persons.[9] WSB also proposes to allot Channel 284C1 to Altamont, as a replacement for Altamont's present Channel 249C1, and states its intention to apply for the replacement channel.

13. We will first deal with the change of community portion of WSB's counterproposal. In the *Change of Community R&O*, the Commission prohibited the removal of a community's sole local broadcast service. However, this statement was modified in the *Change of Community MO&O* by stating that, although believing the prohibition to be justified, we would consider a waiver of this ban in the "rare circumstances" where removal of a local service might serve the public interest by, for example, providing a first reception service to a significantly sized population. In this case, WSB has only stated that the relicensing of Altamont's sole station to Butte Falls would provide the extremely small community with its first local aural service and provide an additional service to approximately 175,000 persons. No showing is provided that demonstrates that the Butte Falls allotment would provide any first or second aural reception service or even that service to any underserved area (less than five reception services) would be provided. Further, based on the information before us, we cannot find that the allotment of Channel 249C2 to Butte Falls would constitute a first local aural service under the criteria set forth in cases, where, as here, the allotment is requested for a community within an Urbanized Area. *See Bay City, Texas, et al.*, MM Docket 89-459, 8 FCC Rcd 1552 (1993), *recon. den.* 9 FCC Rcd 130 (1994); *Eatonton and Sandy Springs, Georgia, et al.*, 6 FCC Rcd 6580 (1991), *recon. pending*. Butte Falls, and its county, Jackson, is located within the Medford Urbanized Area. With Medford itself having three FM and three AM stations licensed to the community, the allotment of Channel 249C2 to Butte Falls can be considered as no less than a seventh local aural service and, according to KMED, would be a twenty-second service within Jackson County.

14. We recognize that WSB proposes to replace Channel 249C1 at Altamont with Channel 284C1 which it states it would apply for. However, as the Commission has stated:

> "We specifically wish to clarify that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to existing service occasioned by removal of an operating station. From the public's perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply by turning on a TV or radio set."

*See Change of Community MO&O* at 7097. We recognize that Station KCHQ(FM) is presently off-the-air and thus the removal of the channel would not be as disruptive as if the station were presently operating. However, Station KCHQ(FM) was in operation for several years and we believe it is correct to find that the community is entitled to a reasonable expectation that service will be resumed at

[8] The construction permit for Station KXER(AM), Templeton, CA, has been cancelled.

[9] Population figures are taken from the 1990 U.S. Census.

an earlier date by the already constructed and once operating Station KCHQ(FM) than by a new station which must first go through the administrative processes to receive a construction permit and then the actual construction of a new station. Therefore, we find that WSB has not provided a sufficiently compelling public interest justification for the removal of Altamont's only authorized local service.

15. We are also unable to conclude that, even if Station KCHQ(FM) were not Altamont's sole local broadcast service, the public interest would be served by the reallotment of an existing station to Butte Falls. First, while there is a presumption that places which are incorporated or listed in the U.S. Census are communities for allotment purposes, this presumption may be rebutted. Here, the opponents have questioned the status of Butte Falls as a community for allotment purposes but the petitioner has provided no community information beyond stating that it is incorporated and has its own local government. WSB also states that Butte Falls is a "clearly identifiable population group" but provides no specific information as to the social, economic, cultural or governmental indicia which would demonstrate that it is a community for allotment purposes.

16. Finally, although we have denied WSB's counterproposal on grounds unrelated to whether its expression of interest should be considered as *bona fide*, we also cannot find that WSB's expression of interest to be acceptable. We do not question that at some time in the future WSB may indeed be able to resolve its financial problems. However, as the licensee or permittee of at least five stations, none of which are on the air due to problems which include financial ones, we cannot find that WSB would be able to follow through on its promise to promptly apply for and construct another station. In addition, we question whether WSB would indeed apply for Channel 284C1 at Altamont, if allotted as it has proposed. WSB opposed the allotment of Channel 284C1 to Altamont when proposed in MM Docket 91-341, having stated that the terrain between the transmitter site area and the community is hilly and thus the station could not provide Altamont with an adequate signal. *See* 7 FCC Rcd 4599 (1992). Therefore, even though our engineering review shows that the proposals before us can be accommodated by allotting Channel 284C1 to Klamath Falls, Channel 249C2 to Butte Falls, if found to be a community for allotment purposes, and the substitution of Channel 235C1 for Channel 249C1 at Altamont, with the modification of Station KCHQ(FM)'s construction permit to specify the alternate Altamont channel, we decline to do so.[10]

**Technical Summary**

17. We believe the public interest would be served by allotting Channel 284C1 to Klamath Falls as the community's fourth local FM service since an interest has been expressed in providing the community with an additional local transmission service. Channel 284C1 can be allotted to Klamath Falls in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[11]

18. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 24, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Klamath Falls, Oregon | 223C, 258C1, 284C1, 295C1 |

19. The window period for filing applications will open on **August 24, 1995**, and close on **September 25, 1995**.

20. IT IS FURTHER ORDERED, That the counterproposal filed by Western States Broadcasting, Inc. (RM-8548), to substitute Channel 249C2 for Channel 249C1 at Altamont, OR, reallot Channel 249C2 to Butte Falls, OR, modify Station KCHQ(FM)'s construction permit to specify Butte Falls as its community of license and allot Channel 284C1 to Altamont IS DENIED.

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

22. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[10] Since WSB has committed itself to applying for the alternate Class C1 channel which it has proposed for Altamont, it must still desire to remain an Altamont broadcaster. Therefore, we believe that WSB would not be disadvantaged by opening a filing window for the Butte Falls channel instead of the Altamont channel.

[11] The coordinates for Channel 284C1 at Klamath Falls are 42-12-56 North Latitude and 121-47-56 West Longitude.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Falcon Cable Systems Co. CUID No. CA0631 (Atascadero)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 26, 1995; Released: July 10, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsiderution*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Hi-Desert Cablevision | CUID Nos. CA0003 (Apple Valley) |
| Benchmark Filings | CA0072 (Victorville) |
| to Support | CA0846 (Uninc. Victorville) |
| Cable Programming Service Price | CA1247 (Hesperia) |

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 22, 1995; Released: July 10, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on the Appendix. Operator filed FCC Forms 393 in response; Operator has also filed amended and supplemental Form 393 filings.[11]

5. Operator asserts that its monthly CPS tier price is justified by its benchmark filings because its price is lower than the maximum permitted charge as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Part II of its FCC Forms 393, Operator did not correctly enter its basic and CPS tier prices on Line 101 of Worksheet 1 or on Line 201 of Worksheet 2. Accordingly, we adjusted Worksheets 1 and 2 to reflect tier charge information that is consistent with Operator's rate cards.

b. In Column F of Schedules A and C of Part III of its FCC Forms 393, Operator did not use the 11.25% rate of return prescribed by the Commission when calculating its capital costs of service, installation and maintenance of equipment, and its leased customer equipment capital costs.[12] By not using the 11.25%

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ 295 n.715 (1993). *See also* Questions and Answers on Cable Television Rate Regulation, Question and Answer No. 15 (released May 6, 1994) ("Therefore, in completing Forms 1205 and 393, operators must include an 11.25% return on equipment and installation charges before unbundling equipment and installation charges.").

rate of return prescribed, an operator could effectively increase its CPS price. Furthermore, this approach leaves a portion of an operator's equipment costs bundled with its programming charge. Accordingly, we adjusted Schedules A and C (and subsequent steps) to reflect an 11.25% rate of return.

c. In Column G of Schedules A and C of Part III of its FCC Forms 393, Operator failed to gross-up its tax entries. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[13] In accordance with this principle, we recalculated Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 51.51% of Operator's return on investment.

d. Operator's Forms 393, Worksheet 1, Line 104 entries do not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figures it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entries.[14] However, Operator's entries on Line 104 differed substantially from its entries on Line 34. We therefore adjusted Line 104 to equal the corrected amounts entered on Line 34.

e. Because of these errors, we conclude that Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date as to which Operator filed.[15] On its amended Forms 393, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rate, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the periods in question. Operator's showings justify a maximum reasonable CPS tier price of $15.99 per month (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in the Appendix) to May 14, 1994.[16]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in the Appendix against the cable programming service price charged by Operator in the franchise areas referenced in the caption ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise areas referenced in the caption that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on the Appendix)[17] to May 14, 1994 which exceeded $15.99 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the franchise areas listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $15.99 (plus franchise fee).[18]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, a price that reflects the reduction in the CPS rate determined in this Order.

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[13] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax-paying business entities to the extent that it has a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

[14] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[18] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| CA0003 | 10/26/93 | 10/21/93 |
| CA0072 | 12/14/93 | 12/10/93 |
| CA0846 | 10/26/93 | 10/20/93 |
| CA1247 | 10/26/93 | 10/21/93 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaints of Andrea Kessler

Licensee of LPTV Station
W09BZ, East Bernstadt, Kentucky

Against

| | |
|---|---|
| Warner Cable Communications<br>Garrad, Kentucky | CSR-4464-M |
| Falcon Cable TV<br>Somerset, Kentucky | CSR-4465-M |
| Livingston Cable TV<br>Livingston, Kentucky | CSR-4466-M |
| American Cable Entertainment<br>Richmond, Kentucky | CSR-4467-M |

Request for Carriage

## MEMORANDUM OPINION AND ORDER

**Adopted: June 22, 1995; Released: July 10, 1995**

### INTRODUCTION

1. On January 9, 1995, Andrea Kessler ("Kessler"), licensee of low power television station W09BZ (Channel 9), East Bernstadt, Kentucky, filed the above-referenced complaints claiming that Warner Cable Communications ("Warner"), Falcon Cable TV ("Falcon"), Livingston Cable TV ("Livingston"), and American Cable Entertainment ("American") serving Garrad, Somerset, Livingston and Richmond, Kentucky, respectively, had declined to carry the station's signal,[1] even though W09BZ is a fully-qualified low power television station within the meaning of §76.56(b)(3) of the Commission's Rules and §§614(c) and (h)(2) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Warner filed an opposition responding that W09BZ does not deliver an adequate signal to that system's headend and is therefore unqualified for carriage under the Commission's rules.[2] The remaining complaints were unopposed.

### SUMMARY OF PLEADINGS

2. In support of its complaint, Kessler argues that it meets all of the applicable requirements for mandatory carriage.[3] Kessler states that it broadcasts 14 hours a day and that it also adheres to the Commission's requirements regarding nonentertainment programming and employment. Kessler further states that it provides programming that addresses local news and informational needs which are not being adequately served by distant full power stations. In addition, Kessler states that W09BZ is located within 35 miles of the relevant systems' headends and is also in compliance with the Commission's interference regulations for low power television stations. Kessler goes on to state that East Bernstadt, the station's community of license, has a population of 500 and that the community is located outside of the 160 largest Metropolitan Statistical Areas. Finally, Kessler states that there are no full power television stations within the county boundaries of the relevant cable systems.

3. In opposition to Kessler, Warner states that it is not required to carry W09BZ because the station does not deliver a good quality signal to its headend facilities. Warner notes that a VHF low power station such as W09BZ must deliver a signal of at least -49 dBm to a cable system's headend.[4] On December 27, 1994, Warner first notified the station that the signal received at its headend was below the required -49 dBm reading. On April 8, 1995, Warner took more measurements of the station's signal at its headend. According to the applicable requirements, if initial measurements were again to indicate a signal of less than -55 dBm, Warner would then be required to take at least four readings over a two hour period.[5] According to Warner, those measurements demonstrate that W09BZ now delivers a signal strength of only approximately -75 dBm to the headend, which is well below the minimum level of -49 dBm required by the Commission. As required, Warner took more than four readings over a two hour period with the following results:

| Time | dBmV | dBm |
|---|---|---|
| 9:14 a.m. | -26.68 | -75.43 |
| 9:46 a.m. | -26.34 | -75.09 |
| 10:15 a.m. | -26.25 | -75.00 |
| 10:44 a.m. | -27.05 | -75.80 |
| 11:14 a.m. | -27.33 | -76.08 |

Average reading =-75.48 dBm[6]

[1] Warner refused Kessler's request for carriage by letter dated December 27, 1994, on the grounds that it did not deliver an adequate signal to the systems's headend. With regard to Falcon, Kessler reported in its complaint that while Falcon originally agreed to carry the station, it later backed out claiming lack of channel space. Likewise, Kessler reports that Livingston originally agreed to carry the station but later reneged on the agreement. American refused carriage by letter dated January 10, 1995 due to signal quality problems.

[2] On March 15, 1995, Warner filed a Supplement to Opposition to Petition for Special Relief. In addition, on April 20, 1995, Warner filed a Supplement to Opposition and finally, on April 24, 1995, Warner filed a Further Supplement to Opposition.

[3] *See* 47 U.S.C. §534(h)(2).

[4] *See* 47 U.S.C. §534(h)(1)(B)(iii).

[5] *See Complaint of Independence Public Media of Philadelphia, Inc. against Suburban Cable TV Co., Inc.*, 8 FCC Rcd 6319, 6319 n.3 (1993).

[6] Pursuant to our requirements, Warner also represents that a notification was sent to Kessler representing that: 1) it utilized a Radio Shack VU190 antenna with 15 feet of RG6U test lead and

4. Finally, Warner argues that W09BZ has not demonstrated that it qualifies for carriage with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity. In addition, Warner asserts that the station has not specifically detailed how it would address local news and informational needs which are not being adequately served by full power television stations.[7] Warner notes that WO9BZ's total response to this requirement was "EOE" which it assumes to mean that the station represents that it is in compliance with the Commission's EEO requirements. However, this is only a portion of the requirements to be complied with and it is unclear if the station is in compliance with other Part 73 requirements of this Cable Act provision. Warner also notes that the Act requires a qualified low power station to be in compliance with the Part 74 requirements governing such facilities.[8] In this regard, Warner believes that W09BZ's response that it is "licensed by the FCC rules" may be inadequate.

## DISCUSSION

5. The Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's rules require the carriage of "qualified" low power television stations in certain limited circumstances.[9] A low power television station that conforms to the rules established for low power stations in Part 74 of the Commission's rules will be considered "qualified" only if: 1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R Part 73; 2) it adheres to Commission requirements regarding nonentertainment programming and employment practices and the Commission determines that the programming by the low power station would address local news and informational needs which are not being adequately served by full power television stations because of geographic distance of such full power stations from the low power station's community of license; 3) it complies with interference regulations consistent with its secondary status; 4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; 5) the community of license of the station and the franchise area of the cable system are both located outside the largest 160 Metropolitan Statistical Areas on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and 6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.[10]

6. The facts stated by Kessler in its complaints and in its notices to Falcon and Livingston indicate that W09BZ is a qualified low power television station within the meaning of §76.56(b)(3) of the Commission's rules and §§614(c) and (h)(2) of the Cable Television Consumer Protection and Competition Act of 1992. Because neither Falcon nor Livingston has filed a response to Kessler's complaint, we find, based upon the facts as presented in Kessler's complaint, that W09BZ is a qualified low power station and that it is entitled to carriage on Falcon Cable TV in Somerset, Kentucky and Livingston Cable TV in Livingston, Kentucky.

7. With regard to the other cable systems, the 1992 Cable Act provides "that a cable operator is not required to carry a low power television station that does not deliver [a good quality signal] to the principal headend of a cable system."[11] Because the cable operator is in the best position to know whether a given station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it used good engineering practices, as defined below, to measure the signal delivered to the headend.

8. With respect to the standard to be used to determine what constitutes a good quality signal, the 1992 Cable Act adopted a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend: for VHF commercial television station signals, the standard is -49 dBm; for UHF commercial television station signals, the standard is -45 dBm. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we believe it is reasonable to utilize the same standards as prima facie tests to initially determine, absent other evidence, whether VHF or UHF low power stations place adequate signal levels over a cable system's principal headend.

9. To measure a station's signal to see if it meets the Commission's requirements, a cable operator's signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. In addition, our rules require that a cable operator must conduct multiple signal quality tests to ensure accurate results and, in turn, provide that testing information to the affected station when there is a dispute over signal level measurements. Generally, if the test results are less than -55 dBm for a VHF station, we have said that at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period with measurements not more than four hours apart to establish reliable test results.

10. Warner has submitted information regarding all of the signal level readings that it took with respect to W09BZ. On December 27, 1994, Warner notified the sta-

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a Hewlett Packard 8591C spectrum analyzer; 2) specifications concerning the antenna were attached; 3) the antenna was located 50 feet above ground level and pointed to the west, slightly southwest, in the direction of the low power facility; and, 4) measurements were taken at the times indicated above, on a clear, 70 degree day.

[7] 47 U.S.C. §534(h)(2)(B).
[8] 47 U.S.C. §534(h)(2).
[9] 47 U.S.C §534(c)(1); 47 C.F.R. §76.56(b)(3).
[10] 47 U.S.C. §534(h)(2); 47 C.F.R. §76.55(d).
[11] *See* 47 U.S.C. §534(h)(1)(B)(iii).

tion that it had measured the station's signal strength and it was below -49 dBm. On March 9, 1995, Warner attempted to measure the signal again to confirm its original readings, and found no measurable signal. When the station resumed operation on April 8, 1995, Warner took the appropriate number of readings, as required by our rules, and provided all of the necessary information to verify that the readings were done properly. All of the data demonstrates, consistent with Commission requirements, that W09BZ's signal strength at the system's headend is substantially below the level of -49 dBm for VHF stations.

11. In light of the above, W09BZ is not entitled to carriage on the Warner cable system and we thus need not address in detail the other issues raised by Warner. We note, however, that the initial burden rests upon Warner to demonstrate that the low power licensee has not complied with the Commission's rules regarding carriage of qualified low power television stations. In this regard, Warner has not substantiated its allegations regarding nonentertainment programming and other related issues, as well as whether or not the station is in compliance with Part 74 of our requirements regarding low power stations. By this we mean that Warner has not submitted any documentation that it has inspected station records or has in any other way verified the substance of its allegations. As such, we do not believe that Warner has met its burden regarding these issues.

12. On January 10, 1995, American in its response to Kessler's letter request for carriage stated that W09BZ did not deliver a good quality signal to its headend. American noted that, according to its measurements, the signal level received was -54.05 dBm. While American's measurement was not submitted as part of a formal objection in this proceeding, we wish to point out that in any event it would be insufficient to establish low power station W09BZ's poor signal quality. As noted in paragraph 7, *supra*, the initial burden of proving the lack of a good quality signal rests upon the operator. In meeting this burden, the cable operator must show that it used good engineering practices, as described above, to measure the signal delivered to the headend. In this case, because the initial reading was between -55 dBm and -49 dBm, inclusive, the readings should be taken over a 24 hour period with measurements not more than four hours apart to establish reliable tests results. In this case, American has not submitted the test results necessary to supplement its own initial finding.

13. In view of the foregoing, we find that W09BZ is not a qualified low power television station under §76.55(d) of the Commission's rules with respect to the Warner system because it fails to deliver a good quality signal to the headend of that system but that with respect to the Falcon, Livingston and American cable systems it is a qualified station entitled to carriage.

## ORDER

14. Accordingly, IT IS ORDERED that the petitions (CSR-4465-M), (CSR-4466-M), and (CSR-4467-M) filed on January 9, 1995, by Andrea Kessler ARE GRANTED pursuant to §614(c) of the Communications Act of 1934, as amended (47 U.S.C. §534(c)), and Falcon Cable TV and Livingston Cable TV ARE ORDERED to commence carriage of low power television station W09BZ sixty (60) days from the date that station W09BZ provides notice, as described below, of its carriage and channel position election. American Cable Entertainment is ordered to commence carriage of low power station W09BZ sixty (60) days from the date that station W09BZ provides notice of its carriage and channel position election, as described below, unless American Cable Entertainment submits, within fifteen (15) days from the release date of this order, engineering data that demonstrates station W09BZ's poor signal quality at the cable system's principal headend. Low power station W09BZ shall notify the above cable systems in question in writing of its carriage and channel position election (§§76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order*.

15. IT IS FURTHER ORDERED, that the petition (CSR-4464-M) filed on January 9, 1995, by Andrea Kessler against Warner Cable Communications IS DENIED pursuant to §614(c) of the Communications Act of 1934, as amended (47 U.S.C. §534(c)).

16. These actions are taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

John B. Genovese — NAL/Acct. No. 315OR0004
Amateur Radio Station
WB5LOC

**ORDER**

**Adopted: June 30, 1995;** **Released: July 10, 1995**

By the Chief, Compliance and Information Bureau:

## I. INTRODUCTION

1. Mr. John B. Genovese (Petitioner) filed a Petition for Reconsideration, seeking review of the monetary forfeiture of $2,000 issued under authority of Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503(b), for violating Section 333 of the Act, 47 U.S.C. § 333, and Section 97.101(d) of the Commission's rules, 47 C.F.R. § 97.101(d). For the reasons noted below, the Bureau reduces the monetary forfeiture to $500.

## II. BACKGROUND

2. On April 2, 1993, between 7:06 p.m. and 7:11 p.m., Petitioner transmitted signals on amateur radio frequencies 147.27 MHz from amateur radio station WB5LOC. Petitioner used these signals to interfere with the communications of other amateur operators. Based on transcripts made from a recording of these transmissions, the New Orleans Office issued Petitioner a Notice of Apparent Liability (NAL) in the amount of $2,000 on September 10, 1993.

3. Petitioner responded to the NAL, arguing that he never willfully, deliberately, or repeatedly caused interference to other amateur radio stations. In addition, Petitioner claims he was not responsible because someone linked his signals from another frequency over to the frequency on which his transmission was recorded. On November 5, 1993, the New Orleans Office issued a Notice of Forfeiture (NOF) for $2,000. On reconsideration, Petitioner again claims that someone else is responsible for linking his transmissions from another frequency. However, he also states that he believes he was receiving interference and that he does not believe he was interfering with any other amateur.

## III. DISCUSSION AND CONCLUSION

4. As an initial matter, we note that, in assessing the forfeiture amount, the New Orleans Office followed the forfeiture guidelines established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines. *United States Telephone Assn. v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). On reconsideration, the Bureau has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C. § 503(b)(2)(D). In particular, Section 503(b) of Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. § 503(b)(2)(D).

5. Turning now to Petitioner's arguments, we first note that the determination that Petitioner willfully or maliciously interfered with amateur communications is based on transcripts of his transmissions that provide sufficient evidence upon which to conclude that Petitioner violated Section 97.101(d) of the rules. The transcripts reveal that, at approximately 7:06 p.m. on April 2, 1993, Petitioner began transmitting over communications in progress on a directed net on frequency 147.27 MHz. Essentially, Petitioner insisted that he was going to talk, whether recognized or not, and stated that no other station could tell him when he could talk. Petitioner's repeated transmission over net operations constituted willful or malicious interference in violation of Section 97.101(d). With respect to Petitioner's argument that someone else linked his transmissions over from another frequency, we note that the content of Petitioner's transmissions demonstrate that he was aware that his transmissions were being broadcast to a net, which convened Friday evenings at 7:00 p.m. Petitioner's transmissions also indicate that he was aware he was causing interference to communications of other stations. Therefore, it is clear that the Petitioner could have stopped transmitting at any time. In these circumstances, Petitioner's claim that some other party may have been responsible for the interference is without merit.

6. We have reconsidered the monetary forfeiture amount in this case, in accordance with the statutory factors set forth in Section 503(b) of the Act, 47 U.S.C. § 503(b)(2)(D). Recognizing the serious problem of willful or malicious interference to communications on amateur radio frequencies, taking into account congressional interest in this problem, *see* H.R. Rep. 552, 103d Cong., 2d Sess. 40 (1994), and given the evidence in this case demonstrating that Petitioner's actions could not in any way be considered accidental or unintentional, we conclude that the appropriate forfeiture amount is $500. In this particular case, the duration of Petitioner's transmissions as recorded and transcribed do not warrant imposition of a higher fine.

## IV. ORDERING CLAUSES

7. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§ 1.80, 1.106, the petition for reconsideration is GRANTED in part and the monetary forfeiture is REDUCED. Petitioner may file an application for review of this decision within thirty (30) days pursuant to Section 1.115 of the rules. 47 C.F.R. § 1.115.

8. IT IS FURTHER ORDERED that Mr. John B. Genovese must pay the forfeiture amount of five hundred dollars ($500) within thirty (30) days of receipt of this *Order*. Payment may be made by check or money order

payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315OR0004 on the remittance and mail to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested to John B. Genovese.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Chief, Compliance and Information Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's rules.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Vernon A. Paroli
Amateur Radio Station
KA5OWW

NAL/Acct. No. 315OR0005

**ORDER**

**Adopted: June 30, 1995; Released: July 10, 1995**

By the Chief, Compliance and Information Bureau:

## I. INTRODUCTION

1. Mr. Vernon A. Paroli (Petitioner) filed a Petition for Reconsideration, seeking review of the monetary forfeiture of $2,000 issued under authority of Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503(b), for violating Section 333 of the Act, 47 U.S.C. § 333, and Section 97.101(d) of the Commission's rules, 47 C.F.R. § 97.101(d). For the reasons noted below, the Bureau reduces the monetary forfeiture to $700.

## II. BACKGROUND

2. On April 12, 1993, between 8:05 p.m. and 9:29 p.m., Petitioner transmitted signals on amateur radio frequencies 146.85 MHz and 146.76 MHz from amateur radio station KA5OWW. Petitioner used these signals to interfere with the communications of other amateur operators. Based on transcripts made from a recording of these transmissions, the New Orleans Office issued Petitioner a Notice of Apparent Liability (NAL) in the amount of $2,000 on September 10, 1993.

3. Petitioner responded to the NAL, arguing that: he did not violate Section 97.101(d) of the rules; the transcripts upon which the NAL is based are incomplete or inaccurate and; he did not intentionally cause interference to other amateur operators, but that other amateurs interfered with his operations on the date in question. On November 5, 1993, the New Orleans Office issued a Notice of Forfeiture (NOF) for $2,000. The Petitioner now appeals, stating that he did not violate Section 97.101(d) of the rules, contending again that the recordings and transcripts upon which the NAL is based are inaccurate or misleading, and now claiming inability to pay the forfeiture, submitting additional documentation in support.

## III. DISCUSSION AND CONCLUSION

4. As an initial matter, we note that, in assessing the forfeiture amount, the New Orleans Office followed the forfeiture guidelines established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, however, the Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines. *United States Telephone Assn. v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). On reconsideration, the Bureau has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Communications Act, 47 U.S.C. § 503(b)(2)(D). In particular, Section 503(b) of Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. § 503(b)(2)(D).

5. Turning now to Petitioner's arguments, we note that his claim that he did not violate Section 97.101(d) of the rules goes to the ultimate issue in the case. In this regard, the transcripts reveal that, at approximately 8:04 p.m. on April 12, 1993, amateur radio station N5NBI, operating on 146.85 MHz, requested that operators checking into the net that evening wait for recognition before transmitting. Station N5JNX was identified as one of two operators that would not be recognized by the net. Petitioner, identifying himself as "KA5OWW mobile," made nine attempts to check in and not only was Petitioner not recognized, but he was also informed by net control station N5NBI that continued transmissions might constitute malicious interference. Petitioner made two more attempts to check in, then began a 28 minute conversation with amateur station N5NJX over communications already in progress. When the net moved operations to a new frequency of 146.76 MHz, Petitioner and station N5NJX followed and renewed their conversation over net operations for another 23 minutes until the net moved operations back to the original frequency of 146.85 MHz.

6. Petitioner's simple denial that he did not violate Section 97.101(d) of the rules does not address the nature of the violation in this case. Petitioner does not dispute that he transmitted on 146.85 MHz and 146.76 MHz on April 12, 1993, and that his transmissions interfered with the operation of other amateurs. He claims that he did not intend to willfully or maliciously interfere with other amateurs. However, Petitioner repeatedly interfered with communications in progress, transmitting without recognition and then conducting a conversation with another amateur that lasted 28 minutes. When net operations moved to a new frequency, Petitioner followed to the new frequency and continued to disrupt communications. Petitioner does not dispute these facts. Therefore, although Petitioner contends that other amateurs interfered with his operations that evening, it is clear that Petitioner's own operations constituted malicious interference with communications already in progress.

7. We reject Petitioner's contention that the recordings and transcripts on which the NAL is based are inaccurate or misleading. The transcripts were written by staff personnel at the Commission's New Orleans Office from recordings made the evening of April 12, 1993, by a local Amateur Auxiliary group. Use of amateur volunteers for the purpose of monitoring violations in the amateur service is permitted by the Act. 47 U.S.C. § 4(f)(4)(C). In fact, the amateur radio community has distinguished itself for its self-policing operations. *See* H.R. Rep. No. 765, 97th Cong., 2d Sess. 19 (1982) (Commission reporting to Congress the success of amateur self-monitoring efforts). The transcripts record only those portions of dialogue necessary to determine that Petitioner's repeated transmission over net operations, including two conversations over twenty minutes in length, constituted willful or malicious interference in violation of Section 97.101(d). Petitioner's claim that the transcripts, and particularly portions not transcribed, demonstrate that other amateurs interfered with

his operations is simply not relevant to Petitioner's case, nor is it an extenuating factor justifying his causing interference to other amateurs. In short, the transcripts fully support the facts set forth in the NAL.

8. We have reconsidered the monetary forfeiture amount in this case in accordance with the statutory factors set forth in Section 503(b) of the Act, 47 U.S.C. § 503(b)(2)(D). Recognizing the serious problem of willful or malicious interference to communications on amateur radio frequencies, taking into account congressional interest in this problem, *see* H.R. Rep. No. 552, 103d Cong., 2d Sess. 40 (1994), and given the evidence in this case demonstrating that Petitioner's actions could not in any way be considered accidental or unintentional, we conclude that the appropriate forfeiture amount is $700. This amount reflects a reduction based on Petitioner's supported claim that he is financially unable to pay the $2,000 forfeiture originally assessed. The information submitted by Petitioner in support of this claim is included in the Commission's case file and is afforded confidentiality under Section 0.459 of the rules. 47 C.F.R. § 0.459.

## IV. ORDERING CLAUSES

9. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§ 1.80, 1.106, the petition for reconsideration is GRANTED in part and the monetary forfeiture is REDUCED. Petitioner has thirty (30) days in which to appeal this decision pursuant to Section 1.115 of the rules. 47 C.F.R. § 1.115.

10. IT IS FURTHER ORDERED that Vernon A. Paroli must pay the forfeiture amount of seven-hundred dollars ($700) within thirty (30) days of receipt of this *Order*. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315OR0005 on the remittance and mail to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

11. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested to Vernon A. Paroli.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker

Chief, Compliance and Information Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's rules.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Will T. Blanton — NAL/Acct. No. 315OR0006
Amateur Radio Station
N5ROC

**ORDER**

**Adopted: June 30, 1995; Released: July 10, 1995**

By the Chief, Compliance and Information Bureau:

## I. INTRODUCTION

1. Mr. Will T. Blanton (Petitioner) filed a Petition for Reconsideration, seeking review of the monetary forfeiture of $2,000 issued under authority of Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503(b), for violating Section 333 of the Act, 47 U.S.C. § 333, and Section 97.101(d) of the Commission's rules, 47 C.F.R. § 97.101(d). For the reasons noted below, the Bureau reduces the monetary forfeiture to $1,000.

## II. BACKGROUND

2. On March 19,1993 between 7:01 p.m. and 7:45 p.m., and on April 2, 1993, between 7:01 p.m. and 7:11 p.m., Petitioner transmitted signals on amateur radio frequencies 147.27 MHz from amateur radio station N5ROC. Petitioner used these signals to interfere with the communications of other amateur operators. Based on transcripts made from a recording of these transmissions, the New Orleans Office issued Petitioner a Notice of Apparent Liability (NAL) in the amount of $2,000 on September 10, 1993.

3. Petitioner responded to the NAL, arguing that he did not believe he was in violation of Section 97.101(d) and that he never intended to obstruct or interfere with the communications of any other amateur radio station. On November 5, 1993, the New Orleans Office issued a Notice of Forfeiture (NOF) for $2,000. On reconsideration, Petitioner resubmits his response to the NAL.

## III. DISCUSSION AND CONCLUSION

4. As an initial matter, we note that, in assessing the forfeiture amount, the New Orleans Office followed the forfeiture guidelines established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines. *United States Telephone Assn. v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). On reconsideration, the Bureau has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C. § 503(b)(2)(D). In particular, Section 503(b) of Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. § 503(b)(2)(D).

5. Turning now to Petitioner's arguments, we first note that the determination that Petitioner willfully or maliciously interfered with amateur communications is based on transcripts of his transmissions that provide sufficient evidence upon which to conclude that Petitioner violated Section 97.101(d) of the rules. The transcripts reveal that, at approximately 7:01 p.m. on March 19, 1993, Petitioner began transmitting over communications on a directed net on frequency 147.27 MHz. Petitioner indicated that he was going to talk, whether recognized or not. He then followed the net when it moved to 145.43 MHz and when it moved back to 147.27 MHz. Thus, Petitioner continued to disrupt communications until 7:45 p.m. On April 2, 1993, Petitioner again caused interference on 147.27 MHz by transmitting over communications in progress until the net moved to another frequency.

6. We have reconsidered the monetary forfeiture amount in this case, in accordance with the statutory factors set forth in Section 503(b) of the Act, 47 U.S.C. § 503(b)(2)(D). Recognizing the serious problem of willful or malicious interference to communications on amateur radio frequencies, taking into account congressional interest in this problem, *see* H.R. Rep. No. 552, 103d Cong., 2d Sess. 40 (1994), and given the evidence in this case, demonstrating that Petitioner's actions could not in any way be considered accidental, or unintentional, we conclude that the appropriate forfeiture amount is $1,000.

## IV. ORDERING CLAUSES

7. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§ 1.80, 1.106, the petition for reconsideration is GRANTED in part and the monetary forfeiture is REDUCED. Petitioner may file an application for review of this decision within thirty (30) days pursuant to Section 1.115 of the rules. 47 C.F.R. § 1.115.

8. IT IS FURTHER ORDERED that Mr. Will T. Blanton must pay the forfeiture amount of one thousand dollars ($1,000) within thirty (30) days of receipt of this *Order*. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315OR0006 on the remittance and mail to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's rules.

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested to Will T. Blanton and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Chief, Compliance and Information Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Joseph F. Richard, III — NAL/Acct. No. 315OR0007
Amateur Radio Station
N5JNX

**ORDER**

**Adopted: June 30, 1995;** **Released: July 10, 1995**

By the Chief, Compliance and Information Bureau:

## I. INTRODUCTION

1. Mr. Joseph F. Richard, III (Petitioner) filed a Petition for Reconsideration, seeking review of the monetary forfeiture of $2,000 issued under authority of Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503(b), for violating Section 333 of the Act, 47 U.S.C. § 333, and Section 97.101(d) of the Commission's rules, 47 C.F.R. § 97.101(d). For the reasons noted below, the Bureau reduces the monetary forfeiture to $1,000.

## II. BACKGROUND

2. On April 12, 1993, between 8:13 pm and 9:29 pm, Petitioner transmitted signals on amateur radio frequencies 146.85 MHz and 146.76 MHz from amateur radio station N5JNX. Petitioner used these signals to interfere with the communications of other amateur operators. Based on transcripts made from a recording of these transmissions, the New Orleans Office issued Petitioner a Notice of Apparent Liability (NAL) in the amount of $2,000 on September 10, 1993.

3. Petitioner responded to the NAL, arguing that he did not willfully or maliciously cause interference to other operations, and that he was the one being interfered with because he was on the frequency. He also acknowledged having conversed for a lengthy period of time on the date in question. On November 5, 1993, the New Orleans Office issued a Notice of Forfeiture (NOF) for $2,000. The Petitioner now appeals, stating that no particular complainant claimed that he was interfering with their communications, that the NAL relies upon tapes and transcripts that have been doctored or are inaccurate, and that the New Orleans Office was not objective in handling his case.

## III. DISCUSSION AND CONCLUSION

4. As an initial matter, we note that, in assessing the forfeiture amount, the New Orleans Office followed the forfeiture guidelines established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, however, the Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines. *United States Telephone Assn. v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). On reconsideration, the Bureau has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C. § 503(b)(2)(D). In particular, Section 503(b) of Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D).

5. Turning now to Petitioner's arguments, we first note that the transcripts of Petitioner's transmissions provide sufficient evidence upon which to conclude that Petitioner violated section 97.101(d) of the rules. In this regard, the transcripts reveal that, at approximately 8:13 pm on April 12, 1993, amateur radio station N5NBI, operating on 146.85 MHz, requested that operators checking into the net that evening wait for recognition before transmitting. Petitioner's station N5JNX was identified as one of two operators that would not be recognized by the net. Despite this fact, Petitioner engaged amateur station KA5OWW in conversation for 30 minutes over communications in progress. When the net moved operations to a new frequency of 146.76 MHz, Petitioner and station KA5OWW followed to the new frequency and renewed their conversation over communications in progress on this frequency for another 23 minutes until the net moved operations back to the original frequency of 146.85 MHz.

6. We reject Petitioner's contention that the recordings and transcripts on which the NAL is based are inaccurate or misleading. The transcripts were written by staff personnel at the Commission's New Orleans Office from recordings made the evening of April 12, 1993, by a local Amateur Auxiliary group. Use of amateur volunteers for the purpose of monitoring violations in the amateur service is permitted by the Act. 47 U.S.C. § 4(f)(4)(C). In fact, the amateur radio community has distinguished itself for its self-policing operations. *See* H.R. Rep. No. 765, 97th Cong., 2d Sess. 19 (1982) (Commission reporting to Congress the success of amateur self-monitoring efforts). In the instant case, the transcripts record only those portions of dialogue necessary to determine that Petitioner's repeated transmission over net operations, including two conversations over twenty minutes in length, constituted willful or malicious interference in violation of Section 97.101(d). Other portions not relevant to this finding are omitted from the transcripts. In short, the transcripts fully support the facts set forth in the NAL.

7. We also reject Petitioner's claim that the New Orleans Office was not objective in handling Petitioner's case. In support of this claim, Petitioner first notes that the New Orleans Office issued Petitioner a Notice of Violation on March 20, 1992, for causing interference to amateur communications on November 29, 1991. Thus, Petitioner seems to suggest that the New Orleans Office was already predisposed against the Petitioner. In assessing a monetary forfeiture, the Commission may consider "any history of prior offenses" committed by the violator. 47 U.S.C. § 503(b)(2)(D). Nonetheless, Petitioner's previous violation was not referenced in the NAL and therefore was not a factor in determining the initial forfeiture amount. Therefore, Petitioner's claim that the New Orleans Office was predisposed against Petitioner is without merit.

8. In addition, Petitioner claims that the Commission staff who worked on the case have a personal grudge against Petitioner, and are taking the enforcement actions alone without guidance or restraint from either the Bureau or the Commission. As indicated above, the transcripts in this case provide sufficient evidence to determine that Peti-

tioner violated Section 97.101(d) of the rules. Moreover, at the time the NAL was issued (as well as currently) the Commission's rules expressly authorized the Chief, Compliance and Information Bureau to issue notices of apparent liability in the amount of $20,000 or less, and "to further delegate this authority." 47 C.F.R. § 0.311(d)(1). This forfeiture authority was delegated to the Engineer-in-Charge of each of the Bureau's field offices. *See* 47 C.F.R. §§ 0.311, 1.106, 1.115. We find that the Commission staff in this case acted entirely within the authority delegated by the Commission's rules.

9. We have reconsidered the monetary forfeiture amount in this case in accordance with the statutory factors set forth in Section 503(b) of the Act, 47 U.S.C. § 503(b)(2)(D). Recognizing the serious problem of willful or malicious interference to communications on amateur radio frequencies, taking into account congressional interest in this problem, *see* H.R. Rep. No. 552, 103d Cong., 2d Sess. 40 (1994), and given the evidence in this case demonstrating that Petitioner's actions could not in any way be considered accidental or unintentional, we conclude that the appropriate forfeiture amount is $1,000.

## IV. ORDERING CLAUSES

10. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§ 1.80, 1.106, the petition for reconsideration is GRANTED in part and the monetary forfeiture is REDUCED. Petitioner has thirty (30) days in which to appeal this decision pursuant to Section 1.115 of the rules. 47 C.F.R. § 1.115.

11. IT IS FURTHER ORDERED that Joseph F. Richard, III must pay the forfeiture amount of one thousand dollars ($1,000) within thirty (30) days of receipt of this *Order*. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315OR0007 on the remittance and mail to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

12. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested to Joseph F. Richard, III.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker

Chief, Compliance and Information Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's rules.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

GTE Southwest Incorporated and Cap Rock Telephone Company, Inc. — AAD 94-109

Joint Petition for Waiver of Section 61.41(c)(2) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 3, 1995; Released: July 10, 1995**

By the Chief, Accounting and Audits Division:

## I. INTRODUCTION

1. On August 5, 1994, GTE Southwest Incorporated ("GTE") and Cap Rock Telephone Company, Inc. ("Cap Rock") (collectively, "Petitioners") filed a joint petition for waiver ("Joint Petition") of two commission rules. GTE and Cap Rock both seek a waiver of the definition of "Study Area" contained in the Part 36 Appendix-Glossary of the Commission's rules. That definition constitutes a rule freezing all study area boundaries. The requested waivers would allow GTE and Cap Rock to alter the boundaries of their Texas study areas when transferring four telephone exchanges from GTE to Cap Rock. In addition, Cap Rock seeks a waiver of the price cap rule contained in Section 61.41(c)(2) of the Commission's rules. That rule requires non-price cap companies--and the telephone companies with which they are affiliated--to become subject to price cap regulation after acquiring a price cap company or any part thereof. The requested waiver would permit Cap Rock to remain under rate-of-return regulation after acquiring the four exchanges which currently are under price cap regulation.

2. On October 3, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on the Joint Petition.[1] The Bureau received comments supporting the Joint Petition from three parties: the National Exchange Carrier Association, Inc. ("NECA"), the National Telephone Cooperative Association ("NTCA"), and the United States Telephone Association ("USTA"). At the request of Bureau staff, Petitioners provided additional financial and cost data concerning the Joint Petition.[2] In this Order, we find that the public interest would be served by allowing GTE and Cap Rock to alter their study area boundaries and allowing Cap Rock to continue operating under rate-of-return regulation after acquiring the four exchanges. We therefore grant the Joint Petition, as conditioned and explained more fully below.

## II. STUDY AREA WAIVERS

3. *Background.* A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers operating in more than one state typically have one study area for each state, and carriers operating in a single state typically have a single study area. Study area boundaries are important primarily because carriers perform jurisdictional separations at the study area level.[3] For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[4] The Commission took that action primarily to ensure that local exchange carriers ("LECs") do not set up high-cost exchanges within their existing service territories as separate study areas to maximize high-cost payments.[5] The study area freeze also prevents LECs from transferring exchanges among existing study areas for the purpose of increasing interstate revenue requirements and compensation. A LEC must apply to the Commission for a waiver of the frozen study area rule if the LEC wishes to sell an exchange to another carrier and if that transaction would have the effect of changing the study area boundaries of either carrier.[6]

4. Waiver of commission rules is appropriate only if special circumstances warrant deviation from the general rule[7] and such a deviation will serve the public interest.[8] In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission employs a three-prong standard:[9] first, that the change in study area boundaries does not adversely affect the Universal Service Fund

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[1] Public Notice, 9 FCC Rcd 5717 (Com. Car. Bur. 1994).

[2] Letter from Edwin Shimizu, GTE Service Corporation, to Kent Nilsson, Chief, Cost Analysis Branch, FCC, dated Sept. 6, 1994 ("GTE Supplement"); letter from Margaret Nyland, Kraskin & Lesse, to Kent Nilsson, Chief, Cost Analysis Branch, FCC, dated April 24, 1995 ("Cap Rock April 24 Supplement"); letter from Sylvia Lesse, Kraskin & Lesse, to Office of the Secretary, FCC, dated June 15, 1995 ("Cap Rock June 15 Letter"); letter from Sylvia Lesse, Kraskin & Lesse, to William Caton, Acting Secretary, FCC, dated June 27, 1955 ("Cap Rock June 27 Supplement").

[3] The phrase jurisdictional separations," or "separations," refers to the process of dividing costs and revenues between a carrier's state and interstate operations. See generally 47 C.F.R. §§ 36.1 - 36.741.

[4] 47 C.F.R., Part 36, Appendix-Glossary, definition of "Study Area" (1993). See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*1984 Joint Board Recommended Decision)*, adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Order Adopting Recommendation)*. See also Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice* ).

[5] *See 1985 Order Adopting Recommendation*, 50 Fed. Reg. 939, 940. Also see 1984 Joint Board Recommended Decision, 49 Fed. Reg. 48325, 48337.

[6] 47 C.F.R. Part 36, Appendix-Glossary. See also 47 C.F.R. § 1.3.

[7] Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[8] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[9] *See* US West Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order, 10 FCC Rcd 1771 (1995) (*US West-Eagle Study Area Order)* at para. 5.

("USF") support program;[10] second, that the state commission(s) having regulatory authority over the exchange(s) to be transferred does not object to the change; and third, that the public interest supports such a change. In evaluating whether the change would adversely affect the USF, the Commission applies a "one percent" guideline to study area waiver requests filed after January 5, 1995.[11] This guideline does not apply in the instant case because Petitioners filed before that date.

5. *Petition.* GTE seeks a waiver of the rule freezing study area boundaries to enable it to remove four exchanges, which serve approximately 1,695 access lines, from its Texas study area, which serves approximately 1,229,000 access lines. Cap Rock seeks a similar waiver to enable it to add these four exchanges to its existing Texas study area, which currently consists of ten exchanges serving approximately 2,450 access lines.[12]

6. Petitioners assert that these requests are consistent with the original purpose of the USF and that the resulting impact on the USF would be marginal. Petitioners estimate that, if the study area waivers were granted, the transfer of the four exchanges would cause a net increase of $11,491 in Petitioners' combined USF draw. This net increase, they state, is the combined result of an expected increase of $5,345 (or 0.002 percent) in GTE's USF draw and an expected increase of $6,146 (or 0.017 percent) in Cap Rock's USF draw.[13] Petitioners further assert that the proposed change would serve the public interest because Cap Rock would improve customer service in the newly acquired exchanges by constructing new digital central offices that would provide the latest signalling technology and custom calling features. Cap Rock also would upgrade the local network with new copper distribution plant.[14] Cap Rock estimates that these upgrades would require an investment outlay of $2,000,000.[15]

7. *Discussion.* Petitioners' proposals demonstrate that current and potential customers in the affected exchanges will likely be better served by Cap Rock than GTE. Petitioners state that Cap Rock would construct a modern local network, including new digital offices and new copper distribution plant, that would enable it to provide single-line service to customers now served by party lines and provide enhanced digital services to all customers.[16] We thus believe the transfer of these exchanges, which has not been objected to by the Texas Public Utilities Commission ("Texas PUC"),[17] likely will serve the public interest. In addition, we have determined that the net increase of $11,491 in the combined USF draw for GTE and Cap Rock would not, in the overall context of this transaction, have a significant adverse effect on the USF. We therefore find that the three existing criteria for granting a study area waiver have been met in this instance and that the waiver requests should be granted.

8. Although we find no reason to question Petitioners' estimates of the USF impact, we nonetheless are concerned that those estimates may later prove inaccurate. We have found that, even in a period of a few years, the USF payments for some LECs have risen by unexpected amounts. These LECs generally had undertaken substantial upgrades or expansions of the local network in sparsely populated exchanges, such as those being acquired by Petitioners, which are expensive to serve.[18] Moreover, we are concerned that this sale and a number of similar proposed

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[10] SF PROCEDURE SF RULE *See 1984 Joint Board Recommended Decision*, 49 Fed. Reg. at 48337, para. 66. The Commission created the USF to preserve and promote universal service. See Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows LECs with high local loop plant costs to allocate a portion of those costs to the interstate jurisdiction, thus enabling the states to establish lower local exchange rates in study areas receiving such assistance. To determine which LEC study areas are eligible for USF support, the USF rules prescribe an eligibility threshold set at 115 percent of the national average unseparated loop cost per working loop. When loop cost in a particular study area exceeds that threshold, the study area is eligible for support equal to a certain percentage of the loop cost in excess of that threshold. The study area becomes eligible for higher levels of support as its loop cost rises above additional thresholds set farther above the national average unseparated loop cost. Because USF assistance is targeted primarily at small study areas, the level of support provided at each threshold generally is greater if the study area has 200,000 or fewer working loops. *See* 47 C.F.R. § 36.631.

[11] ULES The Commission stated that no waiver of the rule freezing study area boundaries should result in an annual aggregate shift in USF assistance in an amount equal to or greater than one percent of the total USF, unless the parties can demonstrate extraordinary public interest benefit. The USF effect for the year must be computed on an annualized basis. To prevent carriers from evading this limitation by disaggregating a single large sale of exchanges into a series of smaller transactions that in the aggregate have the same effect on the USF, the Commission further requires that the "one percent" guideline be applied to all study area waivers granted to either carrier, as a purchaser or seller, pending completion of the current review of the USF program. In this context, the Commission defines the term "carrier" to include all affiliated carriers *(i.e.,* those carriers that are in common control, as the term "control" is defined in Section 32.9000 of the Commission's rules, 47 C.F.R. § 32.9000). *See US West-Eagle Study Area Order* at paras. 14-17.

[12] Joint Petition at 2.

[13] Cap Rock April 24 Supplement; GTE Supplement at Attachment. The transaction would result in increased USF draws for both GTE and Cap Rock because the transferred exchanges exhibit loop costs that are below average in comparison to the existing GTE study area but, after upgrades, would be above average in comparison to the existing Cap Rock study area. Hence, the exchange transfer together with the upgrades would raise average loop cost for both the GTE study area and Cap Rock study area. *See id.*

[14] Joint Petition at 2-3.

[15] Cap Rock June 15 Letter.

[16] *Id.*

[17] Letter from Robert W. Gee, Chairman, Texas PUC, to Kent Nilsson, Chief, Cost Analysis Branch, FCC, dated Mar. 24, 1995. In that letter, the Texas PUC states that it neither endorses nor objects to a grant of the study area waivers requested by GTE and Cap Rock. The Texas PUC also states that Section 63 of Article VIII of the Texas Public Utility Regulatory Act does not require LECs to obtain its prior approval when transferring exchanges among themselves; LECs must report, however, such sales within a reasonable period of time after the sale, and remedies are provided to ensure that the sales do not adversely affect the public interest.

[18] *See, e.g.,* Delta Telephone Company, 5 FCC Rcd 7100 (1990), whose USF payment grew from $82,500 in 1991 to approximately $445,700 in 1993; and US West and Gila River Telecommunications, Inc., 7 FCC Rcd 2161 (1992), whose projection of $169,155 for Gila River's 1992 USF payment was more than doubled by the actual 1992 payment of $390,993, which has been nearly doubled again by the 1995 scheduled payment of approximately $750,000.

transactions might, in the aggregate, have a substantial effect on the size of the USF and on those high-cost LECs that draw from the USF.

9. This concern has been mitigated, in the short term at least, by the Commission's recent adoption of the Joint Board's recommendation for an indexed cap on the USF.[19] Yet, even in the short term, unidentified errors contained in Petitioners' impact estimates may adversely affect the fund's distribution, if not its size. Under the indexed USF cap rules, any study area reconfiguration that increases the USF draw of one USF recipient reduces that of other USF recipients. Hence, if Petitioners' estimates prove to be too low, the support provided to other USF recipients could be lowered by an amount that does have a material impact. We therefore find that the waivers should be subject to the condition that the annual USF support provided to each of the study areas affected by the exchange transfers shall not exceed the estimates of the post-transfer amounts submitted by Petitioners in the GTE Supplement and Cap Rock April 24 Supplement. These amounts are $3,193,646 for GTE[20] and $364,881 for Cap Rock.[21]

10. Petitioners have demonstrated that waivers of the rule freezing study area boundaries are warranted. We therefore grant their waiver requests to permit GTE and Cap Rock to alter the boundaries of their Texas study areas when transferring four telephone exchanges from GTE to Cap Rock. These waivers are subject to the condition that, absent explicit approval from the Bureau, future levels of annual USF support shall not exceed $3,193,646 for GTE's Texas study area and $364,881 for Cap Rock's study area. As explained above, the limits imposed by this condition are consistent with Petitioners' representations as to the expected impact of the proposed changes on the annual USF payments they receive. This condition therefore will ensure that the study area waivers will not result in adverse effects on the USF program that exceed Petitioners' forecasts.[22]

## III. PRICE CAPS WAIVER

11. *Background.* Section 61.41(c)(2) of the Commission's rules provides that, when a non-price cap company acquires a price cap company, the acquiring company--and any LEC with which it is affiliated--shall become subject to price cap regulation within a year of the transaction.[23] The Commission stated that this "all-or-nothing" rule applies not only to the acquisition of an entire LEC but also to the acquisition of part of a study area.[24] Hence, under this rule, Cap Rock's acquisition of GTE's four rural exchanges obligates Cap Rock to exit the NECA pools and become subject to price cap regulation instead of rate-of-return regulation.

12. The Commission explained that the all-or-nothing rule is intended to address two concerns it has regarding mergers and acquisitions involving price cap LECs. The first concern is that, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing the non-price cap affiliate to earn more--due to its increased revenue requirement--without affecting the earnings of the price cap affiliate, *i.e.*, without triggering the sharing mechanism. The second concern is that, absent the rule, a LEC may attempt to "game the system" by switching back and forth between rate-of-return regulation and price cap regulation. The Commission cited, as an example, the incentive a price cap LEC may have to increase earnings by opting out of price cap regulation, building up a large rate base under rate-of-return regulation so as to raise rates and, then, after returning to price caps, cutting costs back to an efficient level. It would disserve the public interest, the Commission

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[19] The Joint Board recommended, and the Commission adopted, interim rules that will limit the rate of growth of the USF to the rate of growth in the total number of working loops nationwide. That rate of growth has generally ranged from two percent to five percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive increases in the USF. See generally Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993) (*"1993 Joint Board Recommended Decision"*), adopted by the Commission, 9 FCC Rcd 303 (*"Interim Cap Order"*). In its *Interim Cap Order*, the Commission also expressed its intention to review the USF rules to determine whether permanent changes are necessary. Interim Cap Order at 303.

[20] In a prior ruling, we limited future levels of annual USF support for GTE's Texas study area to $3,188,301, an amount based on GTE's estimates of what the annual USF support will be for that study area after its boundaries are changed to reflect the sales of certain exchanges. *See* GTE Southwest Incorporated, Five Area Telephone Cooperative, Inc. and West Plains Telecommunication, L.L.C. Joint Petition for Waiver of Section 61.41(c)(2) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order, released June 30, 1995, at para. 10. In this ruling, we are increasing that annual USF support limit by $5,345, the impact that GTE estimates the proposed change in study area boundaries would have on the USF payment for its Texas study area. *See* GTE Supplement. Hence, the revised annual limit is $3,193,646 (*i.e.*, $3,188,301 plus $5,345).

[21] *See* Cap Rock April 24 Supplement.

[22] These study area waivers also are subject to the condition that, if the selling LEC is a price cap carrier selling a high-cost portion of its operations, it shall make a downward exogenous adjustment to its Price Cap Index to reflect the change in its study area boundaries. *See* Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1, FCC 95-132, released April 7, 1995 (*"LEC Price Cap Review Order"*), at paras. 328 and 330. Under that requirement, GTE must reduce the Price Cap Index for its Texas study area if the change in study area boundaries reduces the cost basis for that index. The Price Cap Index, which is the cost index on which price-capped rates are based, is calculated pursuant to a formula specified in the Commission's rules for price cap LECs. *See* 47 C.F.R. § 61.45.

[23] 47 C.F.R. § 61.41(c). See Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), modified on recon. 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), petitions for further recon. dismissed, 6 FCC Rcd 7482 (1991), aff'd, National Rural Telecom Assoc. v. FCC, 988 F.2d 174 (D.C. Cir. 1993), further modification on recon., 6 FCC Rcd 4524 (1991)(*ONA Part 69 Order*), second further recon., 7 FCC Rcd 5235 (1992).

[24] The Commission explained that, if these two types of acquisitions were not treated the same under the all-or-nothing rule, a LEC could avoid the rule by selling all but one of its exchanges. See LEC Price Cap Reconsideration Order, 6 FCC Rcd 2637, 2706.

stated, to allow a LEC to alternately "fatten up" under rate-of-return regulation and "slim down" under price caps regulation, because rates would not fall in the manner intended under price cap regulation.[25]

13. The Commission nonetheless recognized that a narrow waiver of the all-or-nothing rule might be justified if efficiencies created by the purchase and sale of a few exchanges were to outweigh the threat that the system may be subject to gaming.[26] Such a waiver would not be granted unconditionally, however. Rather, similar to certain study area waivers,[27] waivers of the all-or-nothing rule would be granted subject to the condition that the selling price cap LEC shall make a downward exogenous adjustment to its Price Cap I ndex to reflect the change in its study area. That adjustment is needed to remove the effects of the transferred exchanges from price-capped rates that have been based, in whole or in part, upon the inclusion of those exchanges in the study areas subject to price cap regulation[28]

14. *Petition.* Cap Rock seeks waiver of Section 61.41(c)(2) so it may operate as a rate-of-return LEC, rather than a price cap LEC, after acquiring the four exchanges which currently are under price cap regulation. Petitioners argue that the rule's application in this instance is contrary to the public interest and does not serve the purposes for which the rule was adopted. Petitioners further argue that the Commission's two concerns, the threat of cost shifting between affiliates and gaming of the system, are not at issue in this case.[29]

15. *Discussion.* We agree with Petitioners that the Commission's first concern underlying the all-or-nothing rule is not applicable in this case. Cap Rock has no incentive to shift costs between price cap and rate-of-return affiliates, because it is not seeking to maintain separate affiliates under different systems of regulation. As to the Commission's second concern, we find it implausible that GTE could game the system by moving the four exchanges back and forth between price caps and rate-of-return regulation, because GTE is selling these exchanges and a reacquisition would require a second study area waiver. Moreover, GTE cannot transfer the four exchanges without removing the rate-increasing effects of those exchanges from the price-capped rates that have been based, in part, upon the inclusion of those exchanges in its Texas study area.[30]

16. We therefore find there is good cause to grant Cap Rock a waiver of the all-or-nothing rule to permit it to remain under rate-of-return regulation after acquiring the four exchanges which currently are under price cap regulation. As noted above, this waiver is subject to the condition that GTE shall make a downward exogenous adjustment to its Price Cap Index to reflect the removal of the five exchanges from its Texas study area. For the present, we will continue to regulate Cap Rock as a rate-of-return carrier. Because we are waiving Section 61.41(c)(2), Cap Rock need not withdraw from the NECA pools. We note that, as with any other rate-of-return carrier, Cap Rock may elect price cap regulation in the future if it decides to withdraw from the NECA pools.

## IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the Joint Petition of GTE Southwest Incorporated and Cap Rock Telephone Company, Inc., for waiver of Part 36, Appendix-Glossary, of the Commission's Rules, 47 C.F.R. Part 36 Appendix-Glossary, and for waiver of Section 61.41(c)(2) of the Commission's Rules, 47 C.F.R. § 61.41(c)(2), IS GRANTED subject to the conditions set forth above.

18. IT IS FURTHER ORDERED that NECA shall not distribute USF assistance exceeding the limits imposed in paragraph 10, *supra.*

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

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[25] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.
[26] *Id.*
[27] *See supra* at note 22.
[28] *See LEC Price Cap Review Order* at para. 330.
[29] Joint Petition at 8.
[30] *See supra* at para. 13.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 90-591**

In re Application of

NANCY NALESZKIEWICZ — File No. 10494-CL-P-430-A-89

For a Construction Permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunications Radio Service to serve the Kansas - 3 (Jewell) Rural Service Area

**ORDER**

**Adopted: June 26, 1995; Released: July 10, 1995**

By the Commission:

1. In our Memorandum Opinion and Order, 10 FCC Rcd 1083 (1995), we granted the application for review filed by Nancy Naleszkiewicz and reversed the Review Board's decision, 8 FCC Rcd 2777 (1993), which denied her application on character grounds. Now before us for consideration is the Petition for Reconsideration filed by the Committee for a Fair Lottery on March 6, 1995.[1] For the reasons set forth below, we will deny the Petition for Reconsideration.

2. This proceeding involves questions, *inter alia*, as to whether the applicant was an accomplice to a fraud perpetrated upon clients of a firm that she and her husband jointly own and whether she had misrepresented facts in order to conceal from the Commission her complicity in the fraudulent scheme. In holding that the applicant is qualified to be a licensee of this Commission, we held that the applicant's testimony in this proceeding denying any involvement in or prior knowledge of the fraud is credible on its face and fully comports with the evidence as a whole, that corroborating testimony confirms the limited and subordinate nature of her role at the firm, that there were no impeaching witnesses or documents, and that the adverse rulings below were based on unfounded conjecture. We further stated that we had carefully reviewed the record, noting that circumstances here warranted special care to ensure that justice is done in this proceeding, 10 FCC Rcd at 1083 ¶ 4. Finally, we found that the applicant's husband had an unusual and compelling incentive to testify truthfully in this proceeding, 10 FCC Rcd at 1084 ¶ 11, and that the applicant's knowledge of the family's business did not in itself establish her involvement in her husband's fraudulent scheme and "demeanor" findings of the ALJ did not warrant any special probative weight, 10 FCC Rcd at 1086 ¶ 20, 1094 ¶ 55.

3. In its petition, the Committee asserts that the Commission's ruling reverses numerous findings of the ALJ, based on a de novo review of the record, despite the failure of the applicant to challenge those findings. According to the Committee, had the applicant filed proper exceptions to the Initial Decision, the Committee would have been able to point out specific aspects of the record supporting the ALJ's findings. Under 47 U.S.C. § 155(c)(6) and 47 C.F.R. § 1.115(h)(1)(i), the Commission in granting an application for review, such as the one filed in this case, has ample authority to reverse or modify the decisions below as warranted upon full review of the record. In any event, under 47 C.F.R. § 1.106(d)(2), the Committee had a full opportunity in its petition for reconsideration to cite findings that it believes to be erroneous and to request that changed or additional findings be made. Under these circumstances, it is clear that these contentions are without merit.

4. The Committee also argues that much of the corroborating evidence supporting the applicant's testimony comes from her husband, a convicted felon who had previously filed false statements with the Commission. Pointing out that the applicant and her husband could be required to make restitution in the amount of $287,600 to the victims of the fraudulent scheme if this license is not awarded to the applicant, the Committee claims that the applicant's husband had every incentive to corroborate her testimony that she had no knowledge or involvement in the wrongdoing. In contrast, the Commission's countervailing premise – that the applicant's husband might be prosecuted regarding the veracity of his statements in this proceeding – is, according to the Committee, speculative at best. The Committee next claims that it was error for the Commission to refuse to give the ALJ's demeanor findings the deference that they are normally accorded. Urging that the ALJ's demeanor findings arose out of an unusual situation where the positive and assertive nature of the witness served to undermine written testimony that "she was a passive dupe," the Committee asserts that the Commission should not have discredited the ALJ's findings simply because he failed to articulate the intangible factors that led to them.

5. As set forth in paragraph 2, above, the questions concerning the latter contentions were fully considered and resolved in our ruling on the merits of this proceeding, and it is well established that reconsideration will not be granted for the purpose of debating such matters again. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir 1965), *cert. denied*, 383 U.S. 967 (1967).

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed March 6, 1995 by The Committee for a Fair Lottery IS DENIED.

[1] The Committee is a voluntary association of applicants who have filed in this and other RSA markets and whose purpose is to curb abuses of the Commission's lottery process. The applicant, who was tentatively selected by lottery as the authorized provider of service in this proceeding, filed an Opposition to the Petition for Reconsideration on March 21, 1995.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-104**

In the Matter of

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|---|---|
| Amendment of Section 73.202(b), | RM-8656 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Johannesburg, California) | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: June 29, 1995; Released: July 11, 1995**

**Comment Date: September 1, 1995**
**Reply Comment Date: September 18, 1995**

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Jacqueline Lago ("petitioner") requesting the allotment of Channel 265A to Johannesburg, California, as that community's second local FM service. Petitioner stated her intention to apply for Channel 265A if it is allotted to Johannesburg, as requested.

2. A staff review of the proposal reveals that Channel 265A can be allotted to Johannesburg, California, consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules, without the imposition of a site restriction, at coordinates North Latitude 35-22-24 and West Longitude 117-38-06. However, as Johannesburg is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican government to the proposal.

3. In view of the interest expressed in providing a second local FM service to Johannesburg, California, we will propose to allot Channel 265A to that community. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to Johannesburg, California, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Johannesburg, California | 280B1 | 265A, 280B1 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 1, 1995,** and reply comments on or before **September 18, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Denise B. Moline, Esq.
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean, VA 22101

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of

the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

INTERNATIONAL TELECOMMUNICATIONS EXCHANGE CORPORATION,
Petitioner,

v. File No. ENF-95-12

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

**ORDER**

**Adopted: June 30, 1995; Released: July 11, 1995**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On November 29, 1994, International Telecommunications Exchange Corporation (INTEX) filed the above-captioned Petition for Declaratory Ruling (Petition) based upon a referral of Certain Communications Act issues by the United States District Court for the Northern District of Georgia. On June 30, 1995, INTEX filed a motion to withdraw the Petition stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting INTEX's motion to withdraw the Petition will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that INTEX's Motion to Withdraw IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned petition IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**June 30, 1995**

**Released: July 12, 1995**

Video Marketing Network, Inc.
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Cannell Communications, L.P.
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RE: WASV-TV, Asheville, NC
File No. BRCT-920604KG-License Renewal Application
File No. BALCT-940330KR-License Assignment Application
File No. BLCT-940509KE-License to Cover Construction Permit

Dear Applicants and Petitioners:

This letter references the above-captioned applications for renewal of WASV-TV's license filed June 4, 1992; for consent to assign that license from Video Marketing Network, Inc. ("VMN") to Pappas Telecasting Companies ("Pappas") filed March 30, 1994; and for a license to cover a construction permit for modification of WASV-TV's facilities filed May 9, 1994. Cannell Communications L.P. ("Cannell"), the former licensee of station WHNS-TV, Asheville, North Carolina, has filed an informal objection to the renewal, a petition to deny the assignment, and an objection to the grant of the license application. The parties have also filed various opposition and responsive pleadings.

Citing *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964), Cannell contends that substantial and material questions of fact exist regarding VMN's basic qualifications requiring resolution in an evidentiary hearing. Specifically, Cannell contends that VMN has violated various Commission rules and has misrepresented and lacked candor in its license renewal application. In addition, Cannell maintains that WASV-TV's prolonged cessation of broadcast operations reflects adversely upon VMN's qualifications and warrants denial of VMN's renewal application. We have reviewed the parties' submissions and we find that there are no substantial and material questions of fact that would justify further inquiry in a hearing. However, this letter serves as a Notice of Apparent Liability of $20,000 for conceded violations of Commission Rules by VMN. Accordingly, we will grant the applications and deny the objections and petition to deny.

**Rule Violations and Forfeiturew**

Cannell alleges that VMN violated various Commission Rules, including Sections 73.1740 (Minimum Operating Schedule); 73.1750 (Discontinuance of Operations); 73.1125(Main Studio); 73.3613 (Filing of Contracts); 73.3615 (Ownership Reports); 73.3526 (Public Inspection File); 73.3612 (Annual Employment Reports); and Section 73.3514 (Content of Application).

In his sworn statement dated May 31, 1994, Robert Murley, President, Director and Chief Operating Officer of VMN conceded that WASV-TV ceased broadcasting without proper authorization in December 1989, closed the station's main studio in Asheville, and sent the station's local inspection file to his corporate headquarters in Sarasota, Florida. Additionally, Mr. Murley conceded that proper ownership reports and related materials were inadvertently not timely filed in accordance with the Commission's rules.

With respect to the other alleged rule violations, it is uncontroverted that VMN employed less than five employees full time and, thus, was exempt from the equal employment opportunity reporting requirements of Section 73.3612. Similarly, we find no violation of the Commission rules by virtue of VMN's not including in its renewal application, at a time when WASV-TV was not broadcasting, a showing that operation of the station was not in excess of the established radio frequency radiation levels. Finally, WASV-TV resumed broadcasting on April 26, 1994 and therefore cannot be in violation of Section 73.1750 which requires notifying the Commission of the station's permanent discontinuation of operations.

VMN has conceded acts which result in repeated and/or willful violations of Sections 73.1125 (Main Studio), 73.3514 (Content of Application), 73.1740 (Minimum Operating Schedule), 73.3526 (Public Inspection File), 73.3613 (Filing of Contracts), and 73.3615 (Ownership Reports) of the Commission's Rules from January, 1990 through at least June, 1992. Accordingly, pursuant to Section 503(b) of the Communications Act and applicable precedent, VMN is hereby advised of its apparent liability for a forfeiture of $20,000 for the above specified violations of Commission Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Act, including the "nature, circumstances, extent, and gravity" of the violations.

**Misrepresentation**

Cannell alleges that VMN, in the June 1993 license renewal application, lacked candor when explaining why the station was unable to meet minimum operating requirements. According to Cannell, VMN engaged in deliberate misrepresentation by erroneously affirming the proper maintenance of a public inspection file, the filing of annual employment reports, and the filing of ownership reports. VMN denies all allegations of deliberate misrepresentation and lack of candor and asserts that the statement

accompanying the license renewal application adequately explained its situation. VMN concedes that the ownership reports were not filed in a timely fashion, but posits that it was a miscommunication with its counsel and not a deliberate intent to deceive that led to the delinquency.

The Commission recently reiterated the importance of the licensee's duty of candor. *See Fox Television Stations* FCC 95-188 (Released May 4, 1995). Lack of candor takes two basic forms: (1) misrepresentation, which involves false statements of fact; and (2) failure to disclose, which involves concealment, evasion, or other failures to be fully informative. The duty of candor requires an applicant before the FCC to be "fully forthcoming as to all facts and information relevant" to its application. *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994). Relevant information is defined as information that may be of decisional significance." *RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 and 457 U.S. 1119 (1982). A party's "intent to deceive" is, however, an "essential element" of a violation of the duty of candor. *Swan Creek*, 39 F.3d at 1222; *accord Garden State Broadcasting Ltd. ship v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Fox River Broadcasting, Inc.*, 102 FCC2d 1179, 1196 (1986). It therefore follows that before an applicant or licensee may be found to have withheld relevant information, it must be shown that the party knew that the information was relevant and intended to withhold it. *See Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993) (no lack of candor where filing was misleading, but made without intent to deceive); In examining character issues, the Commission concerns itself with matters that are indicative of the licensee's truthfulness and reliability. Acts of willful misrepresentation to the FCC go to the core concern of truthfulness.[1] Other violations of the Communications Act, Commission Rules, or Commission policies can possibly be predictive of future truthfulness or reliability, but are not as proximately relevant. *Id.* at 1204-05; *See WPOM Radio Partners, Ltd.*, 6 FCC Rcd 1413 (1991).

**Minimum Operating Requirements** Cannell's contentions that VMN misstated the reasons for going off the air do not raise substantial and material questions of fact that would require further inquiry at a hearing. In the June 3, 1992 license renewal application, VMN reported, "Station WASV-TV has been off the air because of financial problems." VMN maintains that its financial inability to reconstruct the station after the burglary of the main studio equipment caused VMN to go dark. Eventually a new investor was found and the station resumed broadcasting, thus demonstrating that VMN accurately portrayed its problems as financial.

Cannell alleges that VMN lacked candor by not timely informing the Commission of its inability to meet minimum operating requirements. As indicated, VMN has been sanctioned for its failure to timely notify the Commission of its suspension of operations of station WASV-TV. While Cannell argues that this omission was intended to conceal the station's silence from the Commission, the requisite intent to deceive has not been shown nor can it reasonably be inferred from the record. VMN voluntarily reported the discontinuation of WASV-TV's operations in its June 4, 1992 license renewal application. VMN later filed an application for a construction permit to reconstruct the station at a new site and disclosed its status again in a letter pertaining to the modifications of the station's facilities. VMN never falsely represented that the station was operating and never denied the fact that it was off the air. Thus, this allegation of misrepresentation is resolved in favor of VMN.

**Public Inspection File** Cannell alleges and VMN concedes that a proper public inspection file was not maintained while the station was off the air. Therefore, Cannell asserts that VMN engaged in misrepresentation when it certified proper maintenance of the file. However, VMN added "but see attached" to its answer in the renewal application. The attachment stated: "Because the station has been off the air, no issues/program lists were prepared for the period that the station was off the air. Upon a return to the air, these lists will be prepared and filed in the stations public file within 10 days of the end of each calendar quarter, in accordance with the Commission's rules." VMN's explanatory statement documenting the deficiencies in the maintenance of the public inspection file is inconsistent with harboring an intent to deceive. This allegation of misrepresentation is also resolved in favor of VMN.

**Annual Employment Reports** Cannell contends that VMN misrepresented the filing of Annual Employment Reports. VMN that pursuant to the Commission's Rules, they were exempt from filing the reports because they employed less than five employees. The question on the license renewal application asks "Have the following reports been filed with the Commission: (a) The Broadcast Station Annual Employment Reports . . . as required by 47 C.F.R. Section 73.3612?" Section 73.3612 reads "Each licensee . . . with five or more fulltime employees shall file an Annual Employment Report." It is undisputed that, at the time of filing the application, VMN did not employ five or more employees and was thus exempt from this reporting requirement. The fact that VMN did not supply an explanation of its exempt status does not evidence an intent to deceive the Commission, particularly since, as a licensee exempt from any filing allegations, VMN could have no rational basis for such alleged deception. Therefore, this allegation of misrepresentation is resolved in favor of VMN.

**Ownership Reports** Cannell alleges that VMN failed to provide current ownership reports as indicated on the license renewal application. VMN certified that the reports were included and referred to the "Reasons for Late Filing" which asserted, "Current ownership reports will be included under separate cover." VMN concedes that ownership reports were not filed until after VMN learned of the filing deficiency through Cannell's objection to the license renewal. Murley's May 31, 1994, statement explains that the attorney serving as his communications counsel at that time apparently neglected to file the reports or to inform VMN of the deficiency. Although the Commission is reluctant to excuse an applicant's procedural deficiencies because of the alleged malfeasance of counsel, *see, e.g., Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, 420 n.6

[1] *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC2d 1179, 1210-11 (1985), *recon. denied*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991).

(1986), the Commission has been equally reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel. *See WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining who is acting with candor); *Broadcast Associates of Colorado*, 104 FCC2d 16 (1986) (applicant who improperly certified application on advice of counsel not disqualified). *See also Fox Television Stations* FCC 95-188 (Released May 4, 1995). Certainly such a delay in filing is a rule violation and as such is addressed by our forfeiture action here. However, no improper motive or intent to deceive is evident in this matter. Ownership reports were filed immediately upon notice of the deficiency to VMN. These reports confirmed that there have been no significant changes in ownership or control of the station. Indeed, Murley has controlled 80% of the voting stock since VMN acquired the station in 1986. There is no factual showing from which to infer a specific intent to deceive and no perceptible motive for such deception and, thus, this allegation of misrepresentation is also resolved in favor of VMN.

We find that although there are some disputed issues concerning certain subsidiary or "proximate" facts, the totality of the evidence before us does not present a substantial and material question of fact on the ultimate issue of VMN's candor toward the Commission.

### WASV-TV's Silence

Citing *David Lee Communications Inc.*, 8 FCC Rcd 8412 (1993), Cannell argues that WASV-TV's admitted silence since December 1989, without Commission authority, requires examination of the licensee's qualifications in an evidentiary hearing. However, in *Lee*, the licensee's intent and ability to resume broadcast operations and its compliance with Sections 73.1740 and/or 73.1750 of the Commission's Rules were matters in dispute at the time of designation for hearing. Once the licensee resumed broadcast operations, these matters were resolved by summary judgement and a forfeiture was imposed.[2] In the instant case, VMN has recommenced broadcasting, has admitted violation of Section 73.1740, and has already been sanctioned for its contravention of that rule. Thus, the issues of material fact that warranted a hearing designation in *Lee*, have already been resolved in this proceeding.

We are nonetheless concerned about the impact on service to the public that VMN's lengthy failure to notify the Commission of its station's silence status has engendered. Although we do not believe that additional remedies are called for in this particular case, we wish to make clear that longstanding notification failures such as occurred here will come under increasingly close scrutiny as we continue our efforts to ensure the prompt resolution of difficulties preventing the provision of licensed broadcast service to the public.[3]

### CONCLUSION

VMN has been forthright about past violations and has acted affirmatively to correct any and all deficiencies. As VMN has been absolved of all allegations of misrepresentation, the conceded rule violations, by themselves, do not raise a substantial and material question of fact requiring a resolution in a hearing. After reviewing the record and arguments of both parties, and VMN's actions in reconstructing the station and putting it back on the air, we find the protests filed by Cannell insufficient to require a hearing on VMN's qualifications.

In view of the above, we find that the applicants are fully qualified and that grant of the applications would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, that the consolidated informal objections and the petition to deny are GRANTED to the extent indicated herein and are DENIED in all other respects.

IT IS FURTHER ORDERED, that pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. § 503, this NOTICE OF APPARENT LIABILITY FOR FORFEITURE, in the amount of $20,000, is issued to Video Marketing Network, Inc.

IT IS FURTHER ORDERED, that the license renewal application (BRCT-920604KG) filed by Video Marketing Network, Inc. for station WASV-TV; the application (BALCT-940330KR) to assign the license of station WASV-TV from Video Marketing Network, Inc. to Pappas Telecasting Companies, and the application (BLCT-940509KE) for license to cover modification of the facilities of station WASV-TV ARE GRANTED.

Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

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[2] *Accord Cavan Communications*, 10 FCC Rcd 2873 (ALJ, 1995); and *Keyboard Broadcast Communication*, 10 FCC Rcd 4489 (MMB, 1995).

[3] One example of these efforts is our decision in *Report and Order* in MM Docket No. 92-304, 8 FCC Rcd 6314 (1993), where we amended the broadcast renewal application, FCC Form 303-S, to require licensees to report the operating status of their stations. There we observed that "if we are unaware that a station has gone off the air, we cannot assess whether the licensee has complied with our rules for doing so, whether the cessation of service was justified, and whether the licensee has developed an acceptable plan for resuming broadcast service." *Id.*

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Telerama, Inc. CUID No. OH1062 (Pepper Pike)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 5, 1995; Released: July 12, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing, but its actual price is higher than the maximum permitted charge as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations on Form 393:

a. Operator's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) reflect 10 basic tier channels and 21 CPS tier channels. However, these calculations were based on a channel line-up effective prior to the initial date of regulation. Based on the channel line-up which was effective on February 28, 1994, the initial date of regulation, there were 11 basic tier channels and 20 CPS tier channels. We have therefore changed Part II, Worksheet 1, Line 102A from 10 to 11 and changed Part II, Line 102B from 21 to 20. This has the effect of reducing the number of channels on the CPS tier in Part I.

b. In its Form 393 filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of May 1994 using data released by the U.S. Department of Commerce on March 31, 1994. However, Operator's use of May 1994 as the date through which it calculated the inflation adjustment is impermissible. Operator was required to file a justification of its CPS price no later than March 30, 1994. If Operator had filed its justification in a timely fashion, the instructions to Form 393 would have required it to calculate the inflation adjustment only through February 1994. Operator cannot be permitted to claim an additional inflation adjustment simply because it filed Form 393 late. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Operator should have filed. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

we calculate 1.039 as the Inflation Adjustment Factor through February 1994, the base date Operator should have used.

5. After making these adjustments, we find that Operator's actual price did not exceed its maximum permitted CPS price.[11]

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI of San Jose, Inc. — CUID No. CA0197 (Pacifica)

TCI of South Mississippi, Inc. — CUID No. MS0051 (Biloxi)

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 5, 1995; Released: July 12, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. We have found no apparent errors in Operators' calculation of their maximum permitted rates. However, Operators' actual CPS tier prices were above the maximum permitted prices that Operators calculated for the CPS tier. Accordingly, Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operators filed:[12] On their amended Form 393s, Operators calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Operators used in justifying their rates, of 1.034.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[13] However, we further determine that for CUID No. MS0051, the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund in this franchise area.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that the Operator shall refund to subscribers in the community designated by CUID No. CA0197 that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[14] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that for CUID No. CA0197, the Operator shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| CA0197 | 2/24/94 | 2/25/94 |
| MS0051 | 2/28/94 | 2/25/94 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| CA0197 | $11.95 | $11.42 |
| MS0051 | $10.52 | $10.28 |

[13] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| TCI of Arkansas, Inc. | CUID No. AR0056 (Jonesboro) |
| TCI Cablevision of Florida, Inc. | CUID Nos. FL0060 (Port Orange) and FL0365 (Key Colony Beach) |
| TCI of South Florida, Inc. | CUID Nos. FL0436 (Dade), FL0485 (North Miami), FL0486 (El Portal), FL0487 (Miami Shores) and FL0534 (North Miami Beach) |
| TCI of Pennsylvania, Inc. | CUID No. PA0731 (Gilpin) |

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 5, 1995; Released: July 12, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the periodhbeginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For the franchise areas designated by CUID Nos. FL0436, FL0485, FL0486, FL0487 and FL0534, the Operator's actual CPS tier price was above the maximum permitted price that the Operator calculated for the CPS tier and, thus, the Operator failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of the Operator's submission for these franchise areas, we have found that the Operator miscalculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to the Operator's calculations in its Form 393:

a. The Operator incorrectly calculated its benchmark rate as of the initial date of regulation on Form 393, Part II, Worksheet 1, Line 121. The instructions to

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

Form 393 permit an operator to calculate its benchmark channel rate using either the benchmark formula or the benchmark tables. Under either method, however, the benchmark figure that the Operator entered on Line 121 does not agree with the number of regulated channels, satellite channels, and subscribers reported by the Operator. Accordingly, using the information that the Operator reported, we changed Line 121 to 0.619, the figure yielded by the benchmark formula.

b. On its Form 393 filing, the Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of December 1993. However, the Operator cannot permissibly calculate inflation through the end of December 1993. Based on the service date of the earliest valid complaint for each franchise area, the Operator was required to file a rate justification no later than November 15, 1993. If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[12] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[13] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator should have used in justifying its rate for these franchise areas, of 1.030.

6. For the franchise area designated by CUID No. PA0731, the Operator's actual CPS tier price was above the maximum permitted price that the Operator calculated for the CPS tier and, thus, the Operator failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of the Operator's submission for this franchise area, we have found that the Operator miscalculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to the Operator's calculations in its Form 393:

On its Form 393 filing, the Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of March 1994. However, the Operator cannot permissibly calculate inflation through the end of March 1994. Based on the service date of the earliest valid complaint, the Operator was required to file a rate justification no later than February 17, 1994.[14] If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through January 1994.[15] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[16] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through January 1994, the base date the Operator should have used in justifying its rate for this franchise area, of 1.037.

7. For the franchise areas designated by CUID Nos. AR0056, FL0060 and FL0365, we have found no apparent errors in the Operators' calculation of their maximum permitted rates. However, the Operators' actual CPS tier prices were above the maximum permitted prices that the Operators calculated for the CPS tier. Accordingly, the Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operators filed:[17]

On their amended Form 393s, the Operators calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date the Operators used in justifying their rates, of 1.034.

8. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[18] However, we further

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[12] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[14] *See* 47 C.F.R. § 76.956(a).

[15] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[17] *Id.*

[18] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were

determine that for CUID Nos. FL0365 and PA0731, the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order refunds in these franchise areas.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B, except for CUID Nos. FL0365 and PA0731, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[19] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[20]

13. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| AR0056 | 2/25/94 | 2/25/94 |
| FL0060 | 1/18/94 | 1/12/94 |
| FL0365 | 4/1/94 | 3/28/94 |
| FL0436 | 9/27/93 | 9/17/93 |
| FL0485 | 9/27/93 | 9/17/93 |
| FL0486 | 9/27/93 | 9/17/93 |
| FL0487 | 9/27/93 | 9/17/93 |
| FL0534 | 9/27/93 | 9/17/93 |
| PA0731 | 2/3/94 | 1/18/94 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| AR0056 | $12.63 | $12.23 |
| FL0060 | $11.25 | $10.73 |
| FL0365 | $11.73 | $11.50 |
| FL0436 | $12.22 | $11.36 |
| FL0485 | $12.22 | $11.36 |
| FL0486 | $12.22 | $11.36 |
| FL0487 | $12.22 | $11.36 |
| FL0534 | $12.22 | $11.36 |
| PA0731 | $11.91 | $11.77 |

materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

[20] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| TCI of Eastern Iowa, Inc. | CUID No. IA0001 (Ft. Madison) |
| TCI Cablevision of Princeton, Inc. | CUID No. IL0130 (Princeton) |
| TCI Cablevision of Missouri, Inc. | CUID No. MO0152 (Cape Girardeau) |

Benchmark Filings to Support
Cable Programming Service Prices

## MEMORANDUM OPINION AND ORDER

**Adopted: July 5, 1995; Released: July 12, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For the franchise area designated as CUID No. MO0152, the Operator's actual CPS tier price equalled its calculated maximum permitted price. For each of the other franchise areas in this Order, the Operators' actual CPS tier prices were above the maximum permitted prices that they calculated for the CPS tier and, thus, the Operators failed to demonstrate that their prices for the CPS tier were not unreasonable. Upon review of Operators' Form 393 filings, we have found that they have not correctly calculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in Form 393:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[12] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[13] Section 76.923(c)

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] 47 U.S.C. § 543(b)(3).

[13] 47 C.F.R. § 76.923(b).

of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[14] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[15] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $1.40 to $5.60. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[16] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[17] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[18]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[19] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and wep have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[20] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II,

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[14] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[15] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[16] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19-20 (Cab. Serv. Bur., released Feb. 7, 1995).

[17] Operators' calculated hourly service charge in these communities ranges from $22.20 to $28.07.

[18] If, as in other communities, Operators are charging a wire maintenance fee, we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[19] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[20] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

Worksheet 3, Line 301.[21] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. Because the Operators for the franchise areas designated by CUID Nos. IA0001 and MO0152 have failed to demonstrate that their prices for the CPS tier were not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operators filed.[22] On their amended Form 393s, the Operators calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date the Operators used in justifying its rates, of 1.034.

f. Because the Operator for the franchise area designated by CUID No. IL0130 has failed to demonstrate that its price for the CPS tier was not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operator filed.[23] On its amended Form 393, the Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator used in justifying its rate, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[24] However, we further determine that for CUID No. MO0152, the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund in this franchise area.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B, except for CUID No. MO0152, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[25] to May 14, 1994 which exceeded the maximum pricefor each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that, except for CUID No. MO0152, Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[26]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[21] This adjustment to Worksheet 1 has the effect of causing Operators in some franchise areas to calculate their permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. In those franchise areas where Operators did not file a Worksheet 2 and one is needed, we have computed Worksheet 2 by using data supplied by Operators on their Form 1200 filings.

[22] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[23] *Id.*

[24] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[25] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[26] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

## Appendix A

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| IA0001 | 3/1/94 | 2/22/94 |
| IL0130 | 2/28/94 | 2/23/94 |
| MO0152 | 3/30/94 | 2/23/94 |

## Appendix B

| CUID No. | Actual Rates Maximum Permitted | Rates |
|---|---|---|
| IA0001 | $11.06 | $10.53 |
| IL0130 | $11.39 | $10.65 |
| MO0152 | $10.23 | $10.04 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI of Louisiana, Inc. CUID No. LA0146 (Ascension)

TCI Cablevision of Greater Michigan, Inc. CUID Nos. MI0921 (Saugatuck) and MI1480 (Boyne Valley)

TCI Cablevision of Oakland County, Inc. CUID No. MI0987 (Lake Orion)

TCI Cablevision of Central Oklahoma, Inc. CUID No. OK0071 (Muskogee)

TCI Cablevision of Wyoming, Inc. CUID No. WY0009 (Cheyenne)

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 5, 1995; Released: July 12, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For the franchise areas designated as CUID Nos. MI0921, MI0987, MI1480 and WY0009, the Operators' actual CPS tier prices were equal to or below their calculated maximum permitted prices. For each of the other franchise areas addressed in this Order, the Operators' actual CPS tier prices were above the maximum permitted prices that they calculated for the CPS tier and, thus, these Operators failed to demonstrate that their prices for the CPS tier were not unreasonable. Upon review of Operators' submissions, however, we have found that in every case they miscalculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in their Form 393s:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[12] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[13] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[14] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[15] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $5.00 to $16.50. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[16] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[17] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[18]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[19] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and wep have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[20] We have further determined that in order to

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[12] 47 U.S.C. § 543(b)(3).

[13] 47 C.F.R. § 76.923(b).

[14] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[15] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[16] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19-20 (Cab. Serv. Bur., released Feb. 7, 1995).

[17] Operators' calculated hourly service charge in these communities ranges from $19.71 to $27.23.

[18] If, as in other communities, Operators are charging a wire maintenance fee we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[19] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[20] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

yield an unbundling figure of $0.060 per subscriber per channel. Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[21] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. Because Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, we will set maximum permitted prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which each Operator filed.[22] On their amended Form 393s, Operators calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operators used in justifying their rates, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periodsin question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[23]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[24] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[25]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| LA0146 | 10/4/93 | 9/28/93 |
| MI0921 | 10/18/93 | 10/13/93 |
| MI0987 | 2/2/94 | 1/31/94 |
| MI1480 | 11/3/93 | 10/29/93 |
| OK0071 | 12/8/93 | 12/3/93 |
| WY0009 | 10/13/93 | 10/7/93 |

[21] This adjustment to Worksheet 1 has the effect of causing Operators in some franchise areas to calculate their permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. In those franchise areas where Operators did not file a Worksheet 2 and one is needed, we have computed Worksheet 2 by using data supplied by Operators on their Form 1200 filings.

[22] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[23] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[24] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

[25] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

## Appendix B

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| LA0146 | $11.13 | $10.64 |
| MI0921 | $12.24 | $11.76 |
| MI0987 | $12.09 | $11.52 |
| MI1480 | $11.74 | $11.45 |
| OK0071 | $11.75 | $10.94 |
| WY0009 | $12.39 | $12.22 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In Re Complaint of

L. DOUGLAS WILDER and
MARSHALL COLEMAN

Against Station WTVR-TV
Richmond, Virginia

**ORDER**

**Adopted: June 28, 1995; Released: July 13, 1995**

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it: (a) a complaint, filed March 29, 1993, by L. Douglas Wilder and Marshall Coleman (hereinafter, collectively, "Complainants") against Roy H. Park Broadcasting of Va. Inc., licensee of Station WTVR-TV, Richmond, Virginia (hereinafter "WTVR"); and (b) an Opposition to Complaint filed April 28, 1993, by WTVR.[1] Complainants were legally qualified candidates for nomination and election for Governor for the Commonwealth of Virginia for the June 13, 1989, primary election and the November 7, 1989, general election.

2. Complainants allege that WTVR systematically overcharged them during the 1989 primary and general elections, in violation of (the lowest unit charge ("LUC") requirements of § 315(b) of the Communications Act of 1934, as amended.[2] Complainants also allege that WTVR violated the comparable rate provision of the Communications Act 47 U.S.C. § 315(b)(2), and engaged in rate discrimination, in violation of § 73.1941(e) of the Commission's rules.[3]

3. For the reasons set forth below, it is concluded that Complainants have established a *prima facie* case of a violation by Station WTVR of the LUC requirements with respect to the various purchases made by them during the period preceding the 1989 primary and general elections. Complainants failed to establish a *prima facie* case with respect to the allegations that WTVR overcharged candidates during the comparable use period, and engaged in rate discrimination between candidates, and thus these claims are dismissed. Our reasons follow, together with a timetable and procedures for discovery, post-discovery, and election of a procedure for resolving those portions of the complaint which present a *prima facie* case.[4]

**TIMELINESS OF COMPLAINANTS' ACTION**

4. WTVR argues that the complaint is untimely in that it was filed three years and nine months after the primary election and three years and four months after the general election. In support, the station relies on the Commission's statement in the Declaratory Ruling that "complainants should bring any lowest unit charge complaints in a timely manner," *Declaratory Ruling*, 6 FCC Rcd 7521, n.46, and argues, that it is clear from other Commission statements, such as the two year political file retention period, 47 C.F.R. § 73.3526(e) and language in *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith, (WTVT(TV))*, 7 FCC Rcd 6661, 6662-63 (MMB 1992), *modified*, 7 FCC (Rcd 7199 (MMB 1992), *rev. granted in part and denied in part*, 8 FCC Rcd 131, 132 (1992) ("WTVT"), that the complaint falls outside the range of permissible delay. WTVR cited our decision in *WTVT* in which we noted that at the time the complaint was filed, WTVT's political file should have contained the material pertaining to the 1990 election at issue. *WTVT*, 7 FCC Rcd 6661, n.4.

5. WTVR has not presented evidence sufficient to persuade us to dismiss the case as untimely. The Commission has not recognized a two-year statute of limitations for LUC complaints. Our reference to the two-year retention period in *WTVT* recognized only that documents pertaining to candidate purchases were still available in the file. Neither the two-year political file retention period nor our statement in *WTVT* mean that the statute of limitation period for LUC cases should be limited to two years. To the contrary, as stated in *WTVT*, "[o]ur rules do not prescribe or limit the time during which an LUC complaint must be filed." *WTVT*, 7 FCC Rcd at 6661, n.4. Indeed, we have entertained complaints filed more than two years after elections. *KBMT*, 9 FCC Rcd 6051 (MMB 1994).

6. Further, WTVR has not persuaded us that equitable considerations warrant dismissal of the complaint as untimely. It does not assert that, in fact, it has destroyed, in the regular course of business, the commercial records

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[1] With the consent of Complainants' counsel, the due date for the opposition to the complaint was extended to April 28, 1993 and therefore the opposition was timely filed.

[2] Section 315 (b) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. Section 315 (b).

[3] Section 73.1941(e) (formerly § 73.1940(c)), states in pertinent part:

(e) Discrimination between candidates. In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage. . . .

[4] Complainants' request interest and attorney's fees. WTVR opposes Complainants' request. We need not decide here whether the Commission has the authority to employ such remedies as we do not find, at this time, that any of these remedies are warranted in this case.

necessary to resolve this complaint. In addition, even if records are not discoverable, the likelihood is that the Complainants, rather than the licensee, will be harmed.

## I. PRIMA FACIE ANALYSIS

7. This matter is properly before the Bureau pursuant to *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) ("*Declaratory Ruling*"). The *Declaratory Ruling* set forth specific procedural requirements governing § 315(b) complaints.

8. To invoke the Commission's enforcement procedures, complainants who allege a violation of § 315(b) of the Communications Act are required to establish a *prima facie* case showing of such violation. At a minimum, this showing must consist of a "short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 22. A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allegation that a station has overcharged candidates. *WTVT*, 7 FCC Rcd at 6662-63. A complainant may make a *prima facie* case by using generally-available industry or statistical data on average rates to show that the rate paid by a candidate was higher than the average rate charged by the station for the same class of time. *Declaratory Ruling*, 6 FCC Rcd at §7521, n.47. The licensee may submit an answer to the complaint within ten days.

9. If, upon review of the complaint and answer (if filed), the Bureau determines that the complainant has established a *prima facie* case, the Bureau will issue an order giving the parties the opportunity to select one of two dispute procedures for resolving the complaint: mediation or disposition by the Bureau, subject to review by the Commission. *Declaratory Ruling*, 6 FCC Rcd at §7513, ¶ 22. Under either procedure, the complainant is entitled to limited discovery, subject to specific conditions set forth in the Bureau's order. *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 23.

## OVERCHARGE ALLEGATIONS

10. Section 315(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. Section 315(b)(1), directs broadcasters to charge legally qualified candidates for public office "the lowest unit charge of the station" for the same class and amount of time for the same period, during the 45 days preceding a primary election and the 60 days preceding a general or special election ("pre-election period").

### Generally Available Statistical Data

11. In the instant case, Complainants allege that WTVR violated the LUC requirements of § 315(b) of the Communications Act of 1934, as amended, by charging rates for political advertisements on WTVR-TV which exceeded "SCOOP"[5] based rates. Complainants (allege that WTVR-TV overcharged them an estimate of $94,550 for (Coleman and $44,635 for Wilder during the 1989 LUC periods. In (support, Complainants rely on the Declaration, under penalty of perjury, of Leslie J. Edelstein ("Edelstein"). Edelstein describes herself as familiar with the practices and terminology involved with the sale of political advertising.

12. Edelstein alleges that she analyzed WTVR's 1989 "buy records" of "certain candidates," which were provided to her by the candidates or their representatives. She then compared the rates in those records with rates derived by multiplying household ratings for WTVR's various dayparts obtained from Arbitron's "Television Market Report" by the average SCOOP rate for that daypart in the Richmond market obtained from the "Media Market Guide." The demographic used for all calculations was households. After calculating the difference between the SCOOP based rate and the cost for each spot bought by the candidate, she then multiplied that figure by the total number of each such spot purchased to determine the total amount of the overcharges.

13. WTVR responds that Complainants use of SCOOP is unsuited to the candidates' purposes. WTVR claims that Edelstein's analysis is flawed because it compares SCOOP-based average rates with specific rates charged by WTVR. WTVR argues that: 1) SCOOP projections are based upon the experience of time buyers before the period covered by the projections, and therefore their cost per point computations would be based on ratings for these previous periods; whereas the Arbitron ratings that the Complainants cite are measurements made during that period; 2) SCOOP does not provide station-specific figures and multiplying the SCOOP estimates by the "household" rating for WTVR does not correct SCOOP's lack of specificity; 3) Because of changes in viewing patterns, a program may garner "vastly different ratings than originally projected" and/or may no longer exist at the time of the Arbitron survey; and 4) SCOOP does not account for differences in class of time.

14. We find that Complainants have established a *prima facie* case of a violation of the Commission's lowest unit charge requirement by demonstrating that the rates paid by candidates for use of WTVR's facilities during the 1989 lowest unit charge periods were higher than the average rates charged by stations in the Richmond market. Specifically, they have shown that in a substantial number of time periods the actual rates that WTVR charged them for political advertisements on WTVR exceeded station-specific SCOOP-based average rates. For Coleman, the number of time periods where WTVR charges exceeded SCOOP-based average rates were eleven out of eleven time periods in the forty-five days before the primary election and eleven out of thirteen time periods in the sixty days before the general election.[6] For Wilder, the number of time periods where

[5] "SCOOP" is the acronym for Spot Cost Outlook and Projections. SCOOP is a product of "Media Market Guide." SCOOP provides cost-per-point information for eight dayparts and various demographics.

[6] The sixty day period preceding the general election also includes one month in the third quarter in which the rates charged Coleman exceeded station-specific SCOOP-based average rates in thirteen out of fifteen periods.

WTVR charges exceeded SCOOP-based average rates were nine out of thirteen time periods in the sixty days before the general election.[7]

15. As noted above at ¶ 5, the Commission has expressly endorsed the use of generally available industry or statistical data on average rates to establish a *prima facie* case of an LUC violation. *Declaratory Ruling*, 6 FCC Rcd 7511, 7521, n.47 (1992). The SCOOP rates upon which Complainants rely unquestionably constitute an example of the type of generally-available industry or statistical averages contemplated by the Commission. *See WTVT* at 6661. We are aware of the limitations of generally available statistical data such as SCOOP, but we believe that the data provided by Complainants is sufficient, as a barometer of average rates, to establish a *prima facie* case. Any overcharges ultimately found, and rebates ordered, would be based on actual rates paid by commercial advertisers. *See WTVT* at 6663. Therefore, WTVR's arguments challenging the propriety of relying on SCOOP data and comparing that data to specific rates charged to candidates are rejected as inconsistent with the Commission's prior, affirmative statements on the subject.

### Comparison to Television and Cable Factbook

16. The Complainants point to sixteen 30-second spots they purchased where they paid more than the highest 30-second rate charged by the station in 1989 as set forth in the 1990 edition of the *Television and Cable Factbook* (*"Factbook"*). The Factbook lists WTVR's highest thirty second spot rate as $2,000. Because three of the sixteen spots fell outside the LUC window, Complainants also allege a violation of the comparable rate provision of the Communications Act, 47 U.S.C. § 315(b)(2).[8] In response, WTVR asserts that the figures cited in the complaint were not provided to the *Factbook* by WTVR. In addition, WTVR alleges that the 1988 *Factbook* contains the same figures as the 1990 *Factbook*, and since the publication's deadline for the 1988 edition was October 15, 1987, the $2,000 figure was out of date at the time of its 1989 publication.

17. In light of WTVR's response, we find that Complainants' citation to the *Factbook* does not provide evidence sufficient to establish a *prima facie* case of overcharge by WTVR. Consequently, Complainants' claims in this regard are dismissed. Since we have already found that Complainants have established a *prima facie* case of an LUC violation, we note that our finding in this regard is not dispositive.

## RATE DISCRIMINATION ALLEGATION

18. Complainants allege that WTVR charged different rates for different candidates for political advertisments in the same daypart or same WTVR program, in violation of the LUC requirement of § 315(b)(1) and § 73.1941(e) of the Commission's Rules. In support, Complainants provide several examples.

19. In response, WTVR maintains that the apparent discrepancy between the rates charged to the candidates is attributable to differences in classes of time and/or time periods that different candidates purchased. In the 1989 election, WTVR's political rate cards identified at least three classes of time: fixed; preemptible, with 48 hours' notice; and preemptible, with one week's notice (also termed "average selling rate"). WTVR provides information regarding class of time and/or time period for each of the examples cited by the Complainants and points out that differences in the class of time and/or time period purchased account for the differences in rates.

20. In the Complainants' candidate-to-candidate comparison, Complainants have failed to establish a *prima facie* case of an LUC violation and rate discrimination between candidates. Complainants did not indicate the class of time and the comparable time period purchased by each candidate in the examples provided, whereas WTVR identified the class of time and comparable time period purchased in each instance and established class of time and/or time period, as the basis for the differences in rates. The LUC requirements and the nondiscrimination provision of § 73.1941(e) are limited to advertising of the same *class* and amount of time in the same *time & period*.

### Timetable and Procedures for Discovery

21. In the *Declaratory Ruling*, the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See Declaratory Ruling*, 6 FCC Rcd at 7513-14, 7521, n.49. *See also, WTVT*, 7 FCC Rcd at 6665. Accordingly, we will allow Complainants limited discovery on the issue of overcharges during the 45 days before the June 13, 1989, primary. We will also allow Complainants limited discovery on the issue of overcharges during the 60 days preceding the November 7, 1989, general election. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this *Order*, must be served upon counsel for Complainants (not the Commission) by WTVR on or before the first day of the discovery period, which will be 30 days after the release date of this *Order*. *See* Appendix C.

22. Any request for further discovery by Complainants must contain a showing that such discovery is necessary to resolve the issue of overcharges. Any discovery request by WTVR for production of documents, answers to written interrogatories, or for the taking of depositions must demonstrate that the information requested is necessary for WTVR to respond to arguments or claims that could be made by Complainants in their amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of the proposed

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[7] The sixty day period before the general election also includes one month in the 3rd quarter in which the rates charged Wilder exceeded station-specific SCOOP-based average rates in eight out of fifteen time periods.

[8] The comparable rate provision governs charges for political advertising during the period outside of the forty-five days preceding a primary election and the sixty days preceding a general election. Specifically, the Act requires stations to charge a candidate no more than the rate charged other advertisers for a comparable use.

deponents.[9] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

23. Documents produced by WTVR that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, the name(s) of any person employed by the advertiser, and the name of any media company or agency representing the commercial advertisers and any persons employed by such media company or agency. Where any such information is redacted, WTVR shall advise Complainants of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should Complainants serve documents upon WTVR they may redact proprietary information and so advise WTVR of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery disputes before presenting such a dispute to the Bureau.

24. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

25. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to Complainants, the management of WTVR, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission.

26. None of the materials produced, nor the contents thereof, may be used for any purpose other than the prosecution of the instant complaint. Each individual who is provided access to these materials is hereby required to certify in writing that he or she has personally reviewed this order and understands the limitations imposed on the signing party. No copies of materials protected by this order may be made except copies to be used by the persons identified in paragraph 25. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided. Upon termination of this proceeding, including any appeals, petitions or settlement, all originals and reproductions of any protected materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the protected materials of an opposing party shall be destroyed.

27. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. Section 1.24.

28. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

29. Within 30 days after completion of discovery, Complainants must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the Section 315(b)(1) violation and the amounts said to be owed. After WTVR has filed its answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

30. Settlement of lowest unit charge claims is strongly encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See Declaratory Ruling*, 6 FCC Rcd at 7521, n.52.

31. ACCORDINGLY, we find that a *prima facie* case of a violation of the Commission's lowest unit charge requirement has been established by Complainants in connection with advertising aired on WTVR on his behalf during the 45 days before the June 13, 1989, primary. We also find that a *prima facie* case of a violation of the Commission's lowest unit charge requirement has been established by Complainants in connection with advertising aired on WTVR on their behalf during the 60 days preceding the November 7, 1990, general election. The parties are hereby ORDERED to follow the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

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[9] *See Lawton Chiles, Bob Martinez, and Bill Nelson (WTVT(TV))*, 8 FCC Rcd 714, 717 (MMB 1993) (Further Discovery Order). In this regard, we require the party seeking depositions to demonstrate with respect to *each* witness they seek to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted herein. This must include "*specific*" arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence. *Id.*

32. We find that Complainants failed to establish a *prima facie* case with respect to allegations that WTVR overcharged candidates during the comparable use period, and discriminated between candidates in advertising rates charged. Thus, those claims are DISMISSED as to both Complainants.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

## APPENDIX A

### DOCUMENTS TO BE PRODUCED TO COMPLAINANTS

Certain documents shall be produced to Complainants by WTVR by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in this Order. The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the 1989 primary and general elections.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the 1989 primary and general elections.

3) Copies of invoices and contracts for, and program logs related to: all commercial time run on WTVR beginning on the 45 days preceding the 1989 primary election; all commercial time run on WTVR beginning on the 60 days preceding the 1989 general election.

This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired, and, if not apparent from the preceding, documents reflecting all agency discounts provided by the station;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during this period;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;

d) All orders for commercial spots aired during this period, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during this period; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during this period.

4) All documents used by WTVR to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should include any written policy statement(s) used by WTVR in 1989 which directly or indirectly related to WTVR's pricing policies.

5) All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of WTVR with respect to the 1989 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by WTVR in performing any such audit or providing any such rebates.

## APPENDIX B

### ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS

Answers to the following interrogatories shall be provided to Complainants in accordance with the procedures set forth in this *Order:*

1) Describe how WTVR arrived at its lowest unit charge ("LUC") in 1989.

2) Detail any actions taken by WTVR to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1989 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at WTVR, and should identify all documents which refer to or formed a part of WTVR's efforts to ensure that candidates received the LUC.

3) Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time period.

4) Provide a statement that explains any codes used by WTVR or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

## APPENDIX C

### TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

| | |
|---|---|
| First day of discovery period (30 days after release of this *Order):* | Day 1 |
| Documents in Appendix A and Answers to Written Interrogatories in Appendix B due: | Day 1 |
| Request by Complainants for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due: | Day 15 |
| Opposition by WTVR to Complainants' request for further discovery due: | Day 20 |
| WTVR's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due: | Day 20 |
| Opposition by Complainants to WTVR's request for discovery due: | Day 27 |
| Documents and answers to written interrogatories (if allowed by Bureau) pursuant to WTVR's request for discovery due: | Day 45 |
| Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to Complainants' request for further discovery due: | Day 60 |
| Final day of discovery period: | Day 60 |
| Complainants' amended complaint due: | Day 90 |
| WTVR's answer to amended complaint due: | Day 105 |
| Joint notice of election of complaint resolution procedure due: | Day 116 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-107**

In the Matter of

Amendment of Section 73.202(b), RM-8661
Table of Allotments,
FM Broadcast Stations.
(Clark, Colorado)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: June 29, 1995; Released: July 13, 1995**

**Comment Date: September 5, 1995**
**Reply Comment Date: September 20, 1995**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on by Brian M. Encke d/b/a BME Broadcasting ("petitioner") requesting the allotment of Channel 225C2 to Clark, Colorado, as that community's first local transmission service.[1] Petitioner stated his intention to apply for the channel it is allotted to Clark, as requested.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See, e.g., Oak Grove, Florida*, 5 FCC Rcd 3774 (1990); *Hannibal, Ohio*, 5 FCC Rcd 3315 (1990); and *Statenville, Georgia*, 5 FCC Rcd 2685 (1990). Clark is not listed in the U.S. Census.[2] Therefore, petitioner is requested to submit information regarding Clark to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental units that identify themselves specifically with that locality.[3]

3. A staff review of the proposal reveals that Channel 225C2 can be allotted to Clark, Colorado, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without the imposition of a site restriction, at coordinates 40-42-22 and 106-55-07.

4. Based upon the petitioner's stated interest, we will propose to allot Channel 225C2 to Clark, Colorado, as requested. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that Clark, Colorado, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Clark, Colorado | -- | 225C2 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 5, 1995**, and reply comments on or before **September 20, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Brian M. Encke
R.R. #1, Box 225
Linden, PA 17744

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or

[1] Petitioner requested the allotment of Channel 251C2 at Clark, Colorado. However, Channel 251C2 at Clark conflicts with the proposed allotment of Channel 251A at Hayden, Colorado (RM-8655). The communities are located 37.1 kilometers apart whereas Section 73.207(b) of the Commission's Rules requires a minimum distance separation of 166 kilometers (103 miles) between Class A-C2 co-channels. Therefore, we have substituted Channel 225C2 for consideration herein.

[2] We do note that Clark is listed in the 1995 Rand McNally Commercial Atlas and Marketing Guide (*"Atlas"*) with a population of 300 (summer population listed as 1,000). However, mere geographic location is not sufficient to establish community status. *See, Vimville, Mississippi*, 48 FR 5974 (1983).

[3] The *Atlas* does indicate that Clark has a post office and its own zip code. However, those attributes alone are not sufficient to establish community status. *See Coker, Alabama*, 43 RR 2d 190 (1978).

review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

**MM Docket No. 95-106**

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Hayden, Colorado) — RM-8655

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: June 29, 1995; Released: July 13, 1995**

**Comment Date: September 5, 1995**
**Reply Comment Date: September 20, 1995**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Thomas Broadcasting ("petitioner") requesting the allotment of Channel 251A to Hayden, Colorado, as that community's second local FM service. Petitioner stated his intention to apply for Channel 251A if it is allotted to Hayden, as requested.

2. A staff review of the proposal reveals that Channel 251A can be allotted to Hayden, Colorado, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without the imposition of a site restriction, at coordinates 40-29-42 and 107-15-30.

3. Based upon the petitioner's stated interest, we will propose to allot Channel 251A to Hayden, Colorado, as requested. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Hayden, Colorado, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Hayden, Colorado | 240C3 | 240C3, 251A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 5, 1995**, and reply comments on or before **September 20, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William J. Pennington, III, Esq.
5519 Rockingham Road-East
Greensboro, NC 27407

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

COMSAT MOBILE COMMUNICATIONS AAD 94-24

Permanent Cost Allocation Manual
for the Separation of Jurisdictional
and Nonjurisdictional Costs

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 3, 1995; Released: July 13, 1995**

By the Chief, Common Carrier Bureau:

## I. INTRODUCTION

1. On January 13, 1994, COMSAT Mobile Communications ("CMC"), a division of Communications Satellite Corporation ("COMSAT"), filed with the Commission a cost allocation manual ("manual") governing the accounting separation of CMC's costs between its jurisdictional and nonjurisdictional activities.[1] The manual was filed pursuant to the Commission's order granting a waiver of its structural separation requirements to permit CMC to offer certainnonjurisdictional maritime services[2] on an unseparated basis.[3] The manual includes a list of CMC's nonjurisdictional activities, a list of activities CMC proposes to treat as incidental to jurisdictional activities for accounting purposes, and information on affiliate transactions, on employee time reporting, and describing how each of CMC's accounts would be allocated between jurisdictional and nonjurisdictional activities.

2. PanAmSAT L.P. ("PAS") filed comments on CMC's manual, and COMSAT filed a reply. In addition to reviewing the pleadings, we have conducted our own review of CMC's manual to determine its consistency with the Commission's rules and policies. We conclude that, while the CMC manual is deficient in some respects, its format and content generally provide us with a sufficient understanding of the proposed cost allocation procedures to permit us to make an informed judgment as to the ability of CMC's allocation procedures to prevent cross subsidies. We also conclude that CMC's manual provides sufficient assurance that misallocation of costs and revenues will not occur to permit CMC to apply its manual pending approval of revisions that meet all Commission requirements. In this Order, we approve CMC's manual subject to its submitting such revisions.

## II. BACKGROUND

3. In the *COMSAT Structure* orders,[4] the Commission permitted COMSAT to engage in nonjurisdictional activities through separate subsidiaries, partnerships, and joint ventures. The Commission concluded that structural separation would permit COMSAT to offer competitive nonjurisdictional services while protecting COMSAT's jurisdictional ratepayers and its competitors from potential anticompetitive behavior by COMSAT. In addition, the Commissionp established procedures and formulas to allocate COMSAT's shared capital costs and expenses between jurisdictional and nonjurisdictional activities to ensure that the jurisdictional ratepayers would not be burdened with any costs or risks associated with COMSAT's nonjurisdictional activities.[5]

4. On November 27, 1991, COMSAT filed a petition requesting a declaratory ruling from the Commission stating that its existing structural separation requirements permit CMC to provide certain nonjurisdictional value-added maritime services on an unseparated basis, subject to existing accounting safeguards. CMC proposed to provide these nonjurisdictional services to its maritime customers as incidental or ancillary to its provision of jurisdictional maritime services via INMARSAT.[6] In the alternative, COMSAT requested that the Commission grant a partial waiver of its structural separation requirements to enable CMC to provide these services on an unseparated basis, subject to existing accounting safeguards.[7]

5. On March 2, 1993, the Commission denied COMSAT's petition for declaratory ruling, but granted its request for partial waiver of the existing structural separation requirements.[8] With respect to the partial waiver, however, the Commission found that the accounting and cost allocation principles established by the *COMSAT Structure* orders would be insufficient to prevent jurisdictional services' cross-subsidizing of nonjurisdictional services when

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[1] The term "Jurisdictional" refers to the activities and services undertaken by COMSAT pursuant to the Communications Satellite Act and subject to rate of return regulation. *See* Sections 102 and 305 of the Communications Satellite Act of 1962, as amended, 47 U.S.C. §§701, 735. These activities include, for example, COMSAT's provision of international satellite service as well as COMSAT's activities as the United States representative to the International Telecommunications Satellite Organization ("INTELSAT") and to the International Maritime Satellite Organization ("INMARSAT"). The term "Nonjurisdictional" refers to the activities outside COMSAT's statutory mission and thus free of traditional rate of return regulation. Communications Satellite Corporation, CC Docket Nos. 80-634 & 85-268, *Memorandum Opinion and Order*, 2 FCC Rcd 3706, 3707 (1987).

[2] COMSAT describes these services as including maritime enhanced services, development of communications software, maritime communications services (other than satellite) provided on a resale basis, and resale or lease of related shipboard equipment. Communications Satellite Corporation, Petition for Declaratory Ruling, or in the Alternative, for Partial Waiver of Structural Separation Requirements, File No. I-S-P-92-001 (filed November 27, 1991), at 2 ("COMSAT petition").

[3] Communication Satellite Corporation, *Memorandum Opinion and Order*, 8 FCC Rcd 1531, 1536 (1993) (*"COMSAT Waiver Order"), petitions for recon. pending.*

[4] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, *Memorandum Opinion and Order*, 90 F.C.C.2d 1159 (1982) (*"First Structure Order"), recon.*, 93 F.C.C. 2d 701 (1983) (*"First Structure Recon."*); *Second Memorandum Opinion and Order*, 97 F.C.C.2d 145 (1984) (*"Second Structure Order"), recon.*, 99 F.C.C.2d 1040 (1984) (*"Second Structure Recon."*); Report and Order, FCC No. 85-178, 50 Fed. Reg. 18304 (April 30, 1985) (*"Final Structure Order"*).

[5] *Second Structure Order*, 97 FCC 2nd at 161.

[6] Footnote 11 *infra*, lists the criteria for incidental treatment.

[7] *See* COMSAT Petition at 1-2, 34.

[8] *COMSAT Waiver Order*, 8 FCC Rcd at 1532, 1534.

the latter were offered on an unseparated basis. The Commission, therefore, conditioned its waiver on the establishment of certain nonstructural safeguards to ensure that service providers and customers are protected from the potential abuse of COMSAT's monopoly power.

6. The Commission required COMSAT to file a manual that must be updated before COMSAT implements any changes in its operations that would render its current manual inaccurate.[9] The Commission further required that the manual filing and subsequent updates be subject to Commission review.[10]

## III. GENERAL ISSUES

### A. Overall Sufficiency of the Manual

7. Although CMC is not subject to Section 64.903(a) of the Commission's rules, we find that CMC should structure its manual in accordance with that section. This is necessary to ensure that CMC's manual contains proper safeguards to prevent cross-subsidization between its jurisdictional and nonjurisdictional activities. Section 64.903(a) lists five types of information that must be included in cost allocation manuals: (1) a description of each of the carrier's nonregulated activities; (2) a list of all the activities to which the carrier accords incidental treatment and the justification for treating each activity as incidental;[11] (3) a chart showing all of the carrier's corporate affiliates; (4) a statement identifying each affiliate that engages in or will engage in transactions with the carrier and describing the nature, terms, and frequency of each transaction; (5) a cost apportionment table showing for each account, the cost pools[12] used in this allocation process, the procedures used to place costs into each cost pool, and the method used to apportion the costs within each cost pool between regulated and nonregulated activities; and (6) a description of the time reporting procedures that the carrier uses, including the measures or studies designed to allocate nonproductive time.[13]

8. As discussed in detail below, we find that CMC's manual contains cost accounting procedures that are adequate to meet our requirements and that are at a level of detail necessary for us to conclude that the manual's procedures will discourage cross subsidies. Moreover, we believe that, overall, CMC's manual provides adequate detail for Commission audits of CMC's cost allocation practices to be performed. We note that a number of ambiguities and omissions exist in the manual that must be corrected by additional information and amendments. This additional information is necessary to fully understand CMC's operations and to complete our analysis of CMC's manual. We do not believe that these omissions or other defects require rejection of CMC's manual. Instead, we find that the best procedure is to permit CMC to implement its manual, while it makes necessary revisions. Our approval of CMC's manual, therefore, is conditioned upon the timely submission of revisions responsive to the matters discussed in this Order.

### B. Nonregulated Activities

9. The manual contains a list of CMC's nonregulated activities and describes CMC's accounting treatment for each activity.[14] Generally, the manual provides adequate descriptions of these nonregulated services and their accounting treatment.[15] We ask CMC, however, to state what the initials represent in two services as follows: "MMS" Workstation Manager Software Service; and Multichannel Std "A & M" ES Equipment Financing. Further, in order to comply with our manual requirements, CMC should provide a matrix which lists each nonregulated service and the accounts that are associated with each service. We direct CMC to revise Section II of its manual to clarify the acronyms in its value-added services and to provide the nonregulated activities matrix.

### C. Incidental Activities

10. The manual lists supplemental call detail service as the only nonjurisdictional activity that CMC proposes to offer as incidental to jurisdictional activities.[16] CMC, however, has not shown that this service meets all of the criteria for incidental treatment.[17] We direct CMC to provide information in Section III of its manual that demonstrates whether this service meets the criteria for incidental treatment.

### D. Affiliate Transactions

11. With respect to affiliate transactions, carriers are required to provide the nature, terms and frequency of each type of affiliate transaction in which they engage. The manual describes transactions between CMC and other divisions of COMSAT, and COMSAT's affiliates. It provides a list of COMSAT's affiliates, a list of each type of affiliate transaction in which CMC engages, and the nature and

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[9] *Id.* at 1534. The Commission delegated authority to the Common Carrier Bureau to approve or disapprove COMSAT's nonstructural safeguard submission and subsequent revisions. *Id.* at 1534 n.32.

[10] *Id.* at 1535-36.

[11] The criteria for nonregulated activities to be treated as incidental activities are as follows: (1) the activity must be an outgrowth of regulated operations; (2) it cannot constitute a separate line of business; (3) it must have traditionally been treated as incidental for accounting purposes; and (4) the revenues from the incidental activity must not exceed one percent of the carrier's total revenues. Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298, 1308 (1987) ("*Joint Cost Order*"). *Modified on recon.*, 2 FCC Rcd 6383 (1987), *modified on further recon.*, 3 FCC Rcd 6701 (1988) *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir.1990).

[12] Cost pools represent logical, homogenous groupings of cost that maximize the extent to which cost-causative allocation factors can be used. 47 C.F.R. §64.901(b)(3).

[13] 47 C.F.R. §64.903(a).

[14] These ten value-added activities are: Profit Center Accounting Service; MMS Workstation Management Software Service; Cellular Phone Service; Lease of Maritime Differential Global Positioning Service ("DGPS") Equipment; Multichannel Standard ("Std") A & M Earth Station ("ES") Equipment Financing; FaxMail Service; Roffer's Fish Forecast Service; C-Track Service ("C" is a type of earth station terminal); Instant News Service; and MARIPRESS Service.

[15] CMC's Manual at Section II.

[16] CMC's Manual at Section III.

[17] *See* n.11 *supra* for criteria for incidental treatment.

terms of these transactions.[18] We find that this section of the manual is deficient in two respects. First, CMC does not provide the frequency of the service provided in its description of affiliate transactions. Frequency can be described through words as "daily," "monthly," or "ongoing." We direct CMC to amend its affiliate transaction section of its manual to include the frequency of service for each transaction listed.

12. Second, CMC's descriptions of the "terms" of the transactions lack precision. CMC uses such phrases as "cost," "cost plus a fixed monthly fee," and "cost plus profit" to describe the terms of the transactions. CMC provides no definitions of these terms in its manual, thus making it difficult to distinguish among them. For example, most transactions that CMC lists between itself and the other divisions of COMSAT are at "cost." We direct CMC to define "cost" consistent with the Commission's use of "fully distributed cost."[19] In another example, CMC states that it provides support to the cellular resale services of COMSAT Mobile Investment under contract, the terms of which CMC describes as "cost plus a fixed monthly fee." We direct CMC to explain how it computes this fixed monthly fee and the amount of payment in excess of cost. Finally, COMSAT Technology Services provides a number of services to CMC at "cost plus profit", which CMC states is the same rate that COMSAT Technology Services charges unaffiliated companies. This would appear to be a prevailing company price. We direct CMC to define "cost plus profit" and explain how it differs from prevailing company price.

## IV. ACCOUNT-BY-ACCOUNT ANALYSIS

13. CMC's manual describes the methods it proposes to use to derive cost pools and to apportion costs between regulated and nonregulated activities.[20] In Section I, CMC provides a narrative description of its cost apportionment procedures.[21] In Section VI, CMC provides apportionment information in table format.[22] In addition to addressing issues regarding cost pool assignment and cost apportionment bases of individual accounts contained in the manual, we have reviewed the manual and identified additional issues to be resolved.

### A. Cost Allocation Tables

14. CMC provides an overview of its cost methodology and how it distinguishes its jurisdictional activities from its nonjurisdictional activities in Section I, Introduction, of the manual. As described in that section, CMC allocates its costs among five cost centers: Aeronautical, Land Mobile, Jurisdictional Maritime, Nonjurisdictional Maritime, and Common. CMC assigns or allocates costs from its cost pools to these cost centers using four methods: direct assignment, assignment based upon space segment utilization charges;[23] assignment based upon customer billable minutes; and allocations based upon a general allocator.[24]

15. We have reviewed CMC's cost accounting methods, and we find two deficiencies. First, CMC uses its general allocator to allocate all common costs that are not associated with INMARSAT or earth stations. The common cost pools that are allocated based upon the general allocator appear to contain a wide variety of costs. We believe that CMC can subdivide these common costs into more homogeneous common cost pools. This would allow CMC to use a more cost-causative allocator for more cost pools than by using the general allocator. We direct CMC to review all of its common cost pools that are allocated based upon the general allocator to determine whether they can be subdivided into cost pools that can be allocated based upon more cost-causative allocators. If CMC continues to allocate any costs based upon its general allocator, it shall explain in detail its reasons for doing so.

16. Second, CMC refers to one of its allocators as "space segment utilization charges" in Section I of its manual. In Section VI of its manual, CMC appears to be referring to the same allocator, but CMC uses the phrase "satellite system utilization charges". If these phrases refer to the same allocator, CMC should be consistentx in its use of terminology throughout the manual. We direct CMC to amend its manual to refer to this allocator consistently throughout the manual. If these allocators are different, however, CMC should make this fact clear in its manual.

### B. Specific Accounts

#### Account 2122, Furniture

17. CMC creates a cost pool for INMARSAT in Account 2122. Section VI of the manual states that costs in this cost pool are assigned to the common cost center and then allocated to the Aeronautical, Land Mobile and Maritime Jurisdictional cost centers based upon customer billable minutes. Section I of the manual, however, indicates that INMARSAT related activities are allocated based upon space segment utilization charges. CMC must clarify which factor it uses to allocate the INMARSAT cost pool and justify its use.

#### Account 2231, Satellite and Earth Stations, Account 3100, Accumulated Depreciation, and Account 6561, Depreciation-Telecommunications Plant in Service ("TPIS")

18. Account 2231 contains the plant investment in satellites and earth stations; Account 3100 contains the accumulated depreciation associated with this plant investment; and Account 6561 contains the depreciation expense associated with this plant. COMSAT apparently uses one allocator to apportion the satellite and earth station investment and depreciation expense, but uses another allocator

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[18] CMC's Manual at Section V.

[19] "Fully distributed cost" is determined for this purpose by applying the standards and procedures for apportionment of joint and common costs prescribed in Section 64.901 of the Commission's rules. 47 C.F.R. §64.901.

[20] CMC's cost pools are created from its accounts and subaccounts. Cost centers are lines of CMC's business to which costs are assigned from cost pools.

[21] CMC's Manual at Section I.

[22] *Id.* at Section VI.

[23] Space segment utilization charges are a transfer pricing mechanism developed by INMARSAT to reflect the use of the INMARSAT satellites by the various INMARSAT service offerings.

[24] CMC's general allocator is calculated by using the sum of all expenses that are directly assigned or allocated by space segment utilization charges and customer billable minutes. The formula is computed by dividing gross operating expense for each benefiting cost center by the total gross operating expense of all of the benefiting cost centers.

to apportion the accumulated depreciation. There is an apparent inconsistency between the allocation methods for these corresponding subaccounts. We direct CMC either to select one allocator and justify its use or to justify using two different allocators for these three accounts.

**Research and Development ("R&D")**

19. CMC did not provide corresponding Part 32 accounts for this cost pool.[25] In addition, within this cost pool, CMC creates various subcategories for R&D expenses, *e.g.*, Maritime R&D expenses and Land Mobile and Maritime R&D expenses. CMC does not specify, however, whether these expenses are jurisdictional, nonjurisdictional, or joint. We direct CMC to specify which Part 32 accounts correspond to the R&D cost pool. We further direct CMC to specify whether each subcategory is jurisdictional, nonjurisdictional, or joint. If some of the costs are joint, we direct CMC to specify how they will be allocated between jurisdictional and nonjurisdictional.

**Other Cost Pools**

20. CMC does not provide sufficient information for us to evaluate the following three accounts: Departmental Expenses (Net), O & M, and INMARSAT Unitization (Net). CMC does not define the expenses that are included in departmental expense, we have no idea what constitutes an O & M or INMARSAT Unitization account, nor do these accounts correspond to Part 32 accounts. Without more detailed information, we cannot judge whether CMC's allocation procedures are reasonable. We, therefore, direct CMC to define and describe these accounts and to provide the corresponding Part 32 accounts.

## V. PAS COMMENTS

21. PAS requests that the Commission defer approval of CMC's manual pending the Commission's resolution of concerns raised by PAS in a Petition for Reconsideration of the *COMSAT Waiver Order*.[26] In that petition, PAS argues that COMSAT should not engage in any nonjurisdictional activity on an unseparated basis.[27] PAS does not provide any comments relevant to CMC's cost allocation procedures or methodologies. We believe that PAS's comments relate only to issues raised in its Petition for Reconsideration of the *COMSAT Waiver Order* and are beyond the scope of this proceeding. We, therefore, deny PAS's request to delay approval of CMC's manual.[28]

## VI. OTHER MATTERS

22. In this Order, we require CMC to amend its manual, to clarify certain information relating to cost apportionment. We also direct CMC to provide additional information and explanations regarding nonregulated activities, incidental activities, and affiliate transactions. CMC must submit a revised manual that incorporates the changes we require. These revisions will be subject to notice and comment as required by the *Joint Cost Order*.[29] We require CMC to apply all revisions retroactively to January 1, 1994. In addition to the revisions, we require CMC to update its manual to reflect any operational changes since its original filing. These revisions must be submitted within 60 days of the release date of this Order.

23. When filing manual revisions, CMC must adhere to RAO 19[30] and Section 64.9030[31] of the Commission's rules. RAO 19 establishes uniform filing procedures for manual revisions, and requires that manual revisions be accompanied by a transmittal letter and a matrix of changes. Among other requirements, the matrix must specify each change to the manual and specify the reasons for each change. Because we have required CMC to make numerous revisions and clarifications, for purposes of this Order, the matrix must contain a sufficient level of detail for us to analyze CMC's response to each issue raised in this Order. All revised language in the manual must be in bold-faced type and must be indicated by a vertical line in the right margin. CMC must file four copies of its revised manual with the Office of the Secretary and one copy must be delivered to the Common Carrier Bureau's Accounting and Audits Division.

24. CMC must update its manual at least quarterly. And, if CMC has no revisions, it must file a letter stating that fact. An entire refiling of the manual is required only on December 31 of each year, and whenever specifically required by the Bureau or Commission.

25. In addition to filing a manual, CMC is required to file a paper copy of the Annual Joint Cost Report.[32] The Joint Cost Report is an annual report which must be filed by April 1 of the year following the reporting year, along with the independent audit report.[33]

## VII. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 0.291 of the Commission's rules, 47 C.F.R. §0.291, that the cost allocation manual filed by COMSAT Mobile Communications IS APPROVED, subject to the conditions noted in this Order.

27. IT IS FURTHER ORDERED, that revised copies of CMC's cost allocation manual shall be submitted within 60 days of the release date of this Order.

28. IT IS FURTHER ORDERED, that the request of PanAmSAT L.P. to delay approval of CMC's cost allocation manual is DENIED.

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[25] The Part 32 account for research and development is Account 6727. 47 C.F.R. §32.6727.
[26] PAS Comments at 1.
[27] *Id.* at 2-3.
[28] To the extent that PAS's comments were also made in its petition for Reconsideration of the *COMSAT Waiver Order*, they will be considered when the Commission resolves that petition.
[29] *Joint Cost Order*, 2 FCC Rcd at 1327.
[30] Responsible Accounting Officer Letter No. 19, 6 FCC Rcd 7536 (1991) ("RAO 19").
[31] 47 C.F.R. §64.903(a).
[32] *COMSAT Waiver Order*, 8 FCC Rcd at 1536.
[33] 47 C.F.R. §64.904.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T CORP. File No. I-T-D-95-003

Application for authority to discontinue operation of the U.S.-Cuba Over-the-Horizon Troposcatter System.

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

## ORDER AND AUTHORIZATION

**Adopted: June 29, 1995; Released: July 13, 1995**

By the Chief, Telecommunications Division:

1. The above-captioned uncontested application, filed on April 24, 1995 by AT&T Corp., requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to permanently discontinue operation of the U.S.-Cuba Over-the-Horizon Troposcatter System (OH System). The application was placed on public notice on April 28, 1995. No comments were received.

2. The OH System extends from Florida City, Florida to Guanabo, Cuba. Between August 1957 and August 1992, the OH System was one of the facilities utilized by AT&T to provide communications services between the United States and Cuba. Between the failure of the Key West-Havana 5&6 Cable System in April 1987 and August 1992, the OH System was the primary facilities for such service. In August 1992, the OH System suffered severe damage due to Hurricane Andrew. Only a few Federal Government circuits were restored at that time. These circuits will be transferred without interruption to the recently activated U.S.-Cuba 7 Cable. The OH System is built with antiquated technology and would be very expensive to restore. Further, it had caused interference with the new cellular system in south Florida.

3. Upon review of the application, we find that the OH System has reached the end of its useful service life and all circuits can be transferred to other facilities. Thus, there will be no impairment of service to any community or part of a community formerly served by the OH System as a result of its retirement.

4. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of use and operation by the applicants of the U.S. Cuba Over-the-Horizon Troposcatter System and the substitution of other facilities.

5. This order issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. File No. I-T-C-95-284

Application for authority to acquire and operate facilities for service between the United States and Micronesia.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: June 29, 1995; Released: July 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States and Micronesia by Sprint Communications Company L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-284 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate one 512 Kbps satellite circuit between Sprint's San Ramon, California earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Micronesia, furnished by Sprint's correspondent;

b. own and operate facilities in the San Ramon earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate connecting facilities between the San Ramon earth station and Sprint's Stockton, California operating center;

d. use said facilities to provide Sprint's regularly authorized services between the United States and Micronesia.

3. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Micronesia -- that is, private lines which originate in the United States and terminate in Micronesia or which originate in Micronesia and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Micronesia end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that Micronesia affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T CORP.

Application for authority to convey capacity in the TCS-1 Cable System. File No. I-T-C-95-285

**ORDER AND AUTHORIZATION**

**Adopted: June 29, 1995; Released: July 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-285 IS GRANTED, and AT&T Corp. (AT&T) is authorized to convey to TELMEX on an Indefeasible Right of User (IRU) basis a one-half interest in 30 MAUOs;[1] of capacity in the TCS-1 Cable System between Puerto Rico and the Dominican Republic.

3. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] A MAUO is a 64-kbps circuit equivalent.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T CORP. File No. I-T-C-95-287

Application for authority to acquire and operate capacity in the AMERICAS-1 and Taino-Carib Cable Systems.

**ORDER AND AUTHORIZATION**

**Adopted: June 29, 1995; Released: July 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-287 IS GRANTED, and AT&T Corp. (AT&T) is authorized to:

a. acquire from TELEPUERTO SAN ISIDRO, S.A. d/b/a TRICOM (TRICOM) on an Indefeasible Right of User (IRU) basis a one-half interest in and operate two MIUs [1] of capacity in the AMERICAS-1 Cable System;

b. acquire from TRICOM on an IRU basis a one-half interest in and operate two MIUs of capacity in the Taino-Carib Cable System;

c. acquire by lease, or other comparable means, a one-half interest in and operate necessary overseas connecting facilities; and

d. activate and operate said facilities to provide AT&T's regularly authorized services between the United States and the Dominican Republic;

3. IT IS FURTHER ORDERED that the authority herein is granted subject to the terms and conditions set forth in the C&MAs for the AMERICAS-1 and Taino-Carib Cable Systems, as well as any Commission Order granting authority to acquire and operate facilities in the AMERICAS-1 or Taino-Carib Cable System.

4. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] A MIU is a unit designated as the minimum unit of investment allowing the effective use of 2.048 Mbps (30 MAUOs) and the additional 162.539 bps required for multiplexing in each direction.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CAPITAL NETWORK INTERNATIONAL, INC. — File No. I-T-C-95-307

Application for authority to acquire and operate facilities for service to various overseas points.

**ORDER AND AUTHORIZATION**

**Adopted: June 29, 1995; Released: July 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-307 IS GRANTED, and Capital Network International, Inc. (CNI) is authorized to:

a. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

b. lease and operate facilities in the appropriately licensed U.S. earth stations;

c. acquire on an Indefeasible Right of User basis a one-half interest in and operate the cable circuits specified in Appendix B;

d. lease and operate any necessary domestic connecting facilities;

e. lease a one-half interest in and operate any necessary overseas connecting facilities; and

f. use said facilities to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendices.

3. IT IS FURTHER ORDERED that neither CNI nor any persons or companies directly or indirectly controlling or controlled by CNI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which CNI or any persons or companies controlling or controlled by CNI are parties.

4. IT IS FURTHER ORDERED that our authorization of CNI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, CNI may not -- and CNI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

## APPENDIX A

### INTELSAT CIRCUITS

| Country | No. of 64-kbps Circuits |
|---|---|
| Argentina | 120 |
| Chile | 60 |
| Colombia | 30 |
| El Salvador | 30 |
| Guatemala | 60 |
| Panama | 60 |

## APPENDIX B

### CABLE CIRCUITS

| Country | No. of 64-kbps Circuits | Facility |
|---|---|---|
| Brazil | 60 | AMERICAS-1 |
| Mexico | 120 | COLUMBUS-2 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

JAMAICA COMMUNICATIONS, LTD. — File No. I-T-C-95-323

Application for authority to acquire and operate facilities for service to various overseas points.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: June 29, 1995; Released: July 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a partial grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-323 IS GRANTED IN PART, and Jamaica Communications Ltd. (JCL) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix C, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix C, furnished by its correspondents;

e. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in Appendix D, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix D, furnished by its correspondents;

f. establish channels of communications between appropriately licensed U.S. earth stations and U.S. domestic satellites (also Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix E;

g. lease and operate any necessary domestic connecting facilities;

h. lease a one-half interest in and operate any necessary overseas connecting facilities; and

i. use the facilities in b, c, d and e, above, to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendices.

3. IT IS FURTHER ORDERED that neither JCL nor any persons or companies directly or indirectly controlling or controlled by JCL, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which JCL or any persons or companies controlling or controlled by JCL are parties.

4. IT IS FURTHER ORDERED that our authorization of JCL to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, JCL may not -- and JCL's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending*.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-2, PAS-4, TDRS-41, TDRS-174, or Orion F1 satellites.

11. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

12. IT IS FURTHER ORDERED that action on JCL's request for authority to acquire Morelos and Solidaridad circuits to countries in addition to Mexico, is hereby deferred pending the outcome of the Notice of Proposed Rulemaking in *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, IB Docket No. 95-41, FCC 95-146, released April 25, 1995.

13. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

## APPENDIX A

## COUNTRIES TO BE SERVED VIA INTELSAT

| Country | Circuits | Country | Circuits | Country | Circuits |
|---|---|---|---|---|---|
| Argentina | 80 | Haiti | 80 | Poland | 80 |
| Australia | 80 | Honduras | 80 | Portugal | 80 |
| Austria | 80 | India | 80 | Romania | 80 |
| Bahamas | 80 | Indonesia | 80 | Saudi Arabia | 80 |
| Barbados | 80 | Iran | 80 | Senegal | 80 |
| Belgium | 80 | Ireland | 80 | Singapore | 80 |
| Bolivia | 80 | Israel | 80 | Somalia | 80 |
| Brazil | 80 | Italy | 80 | South Africa | 80 |
| Canada | 80 | Jamaica | 80 | Spain | 80 |
| Czech Republic | 80 | Japan | 80 | Sweden | 80 |
| Chile | 80 | Jordan | 80 | Switzerland | 80 |
| China, People's Republic | 80 | Kenya | 80 | Syria | 80 |
| Croatia | 80 | Korea, Republic of | 80 | Taiwan | 80 |
| Denmark | 80 | Kuwait | 80 | Thailand | 80 |
| Dominican Republic | 80 | Lebanon | 80 | Trinidad & Tobago | 80 |
| Ecuador | 80 | Liechtenstein | 80 | Uganda | 80 |
| Egypt | 80 | Luxembourg | 80 | United Arab Emirates | 80 |
| El Salvador | 80 | Malaysia | 80 | United Kingdom | 80 |
| Ethiopia | 80 | Mexico | 80 | Uruguay | 80 |
| Finland | 80 | Morocco | 80 | Vietnam | 80 |
| France | 80 | Netherlands | 80 | Venezuela | 80 |
| Guantanamo Bay | 80 | Netherlands Antilles | 80 | Slovenia | 80 |
| Germany, Federal Republic of | 80 | New Zealand | 80 | Zaire | 80 |
| Ghana | 80 | Nicaragua | 80 | Macedonia, FYRO | 80 |
| Greece | 80 | Norway | 80 | | |
| Guatemala | 80 | Panama | 80 | | |
| Guinea | 80 | Peru | 80 | | |
| Bosnia-Herzegovenia | 80 | Philippines | 80 | | |
| Serbia & Montenegro | 80 | | | | |

## APPENDIX B

### COUNTRIES TO BE SERVED VIA PAS-1

Up to ten 64-kbps voice-grade circuits between the United States. and the countries listed below. not interconnected with the public switched network:

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzegovenia
British Virgin Is.
Cayman Islands
Croatia
Czech Republic
Denmark
France
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Fed.
Serbia & Montenegro
Slovenia
Spain
Sweden
Switzerland
Turks & Caicos Is.
United Kingdom
Macedonia, FYRO

C-band Countries:

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominican Rep.
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

Up to six 64-kbps voice-grade circuits between the United. States. and the countries listed below. interconnected with the public switched network:

Ku-band Countries:

Azerbaijan
Bahamas
Bosnia-Herzegovenia
Czech Republic
Portugal
Romania
Russian Fed.
Serbia & Montenegro
United Kingdom
Macedonia, FYRO

C-Band Countries:

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

### COUNTRIES TO BE SERVED VIA PAS-2

Up to ten 64-kps voice-gade circuits between the United States and the following countries. not interconnected with the public switched network:
United Kingdom

Up to six 64-kbps voice-grade circuits between the United States and the following countries, interconnected with the public switched network:
United Kingdom

### COUNTRIES TO BE SERVED VIA PAS-4

Up to ten 64-kbps voice-grade circuits between the United States and the following countries, not interconnected with the public switched network:
Australia
Hong Kong
New Zealand

Up to six 64-kbps voice-grade circuits between the United States and the following countries, interconnected with the public switched network:
Australia
Hong Kong
New Zealand

## APPENDIX C

### COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRS

up to ten 64-kbps voice-grade circuits between the United States and the countries listed below. not interconnected with the public switched network;:

TDRS-41
Austria
Bahamas
BelgiumMexico
Bosnia-Herzegovenia
Denmark
Finland
France
Germany
Ireland
Israel
Jamaica
Liechtenstein
Luxembourg
Mexico
Netherlands
Portugal
Serbia & Montenegro
Sweden
Switzerland
Turkey
United Kingdom
Macedonia, FYRO

TDRS-174
Hong Kong
Japan

Philippines Canada
Republic of Korea

Up to six 64-kbps voice-grade circuits between the United States and the countries listed below. interconnected with the public switched network:

TDRS-41

Germany
Bosnia-Herzegovenia
Serbia & Montenegro United
Kingdom
Macedonia, FYRO

TDRS-174

Hong Kong

## APPENDIX D

### COUNTRIES TO BE SERVED VIA THE ORION F1 SATELLITE

Up to six 64-kbps voice-grade circuits between the United States and the countries listed below, interconnected with the public switched network:

Germany
Ireland
The Netherlands
Poland
Sweden

Up to ten 64-kbps voice-grade circuits between the United States and the countries listed below, not interconnected with the public switched network:

Austria
Belgium
Denmark
France
Germany
Ireland
Italy
Luxembourg
Norway
Poland
Serbia & Montenegro
Sweden
The Netherlands
United Kingdom
Macedonia, FYRO

## APPENDIX E

### COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD) SATELLITES, AND ANIK SATELLITES

| | |
|---|---|
| Anguilla | Domestic Satellites |
| Antigua and Barbuda | Domestic Satellites |
| Bahamas | Domestic Satellites |
| Barbados | Domestic Satellites |
| Belize | Domestic Satellites |
| Bermuda | Domestic Satellites |
| British Virgin Islands | Domestic Satellites |
| Canada | Domestic Satellites, ANIK |
| Cayman Islands | Domestic Satellites |
| Dominica | Domestic Satellites |
| Grenada | Domestic Satellites |
| Grenadines | Domestic Satellites |
| MexicoDomSats, Morelos and Solidaridad | |
| Montserrat | Domestic Satellites |
| Netherlands Antilles | Domestic Satellites |
| St. Kitts & Nevis | Domestic Satellites |
| St. Lucia | Domestic Satellites |
| St. Vincent | Domestic Satellites |
| Turks & Caicos | Domestic Satellites |
| Venezuela | Domestic Satellites |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CLEARTEL COMMUNICATIONS, INC. File No. I-T-C-95-324

Application for authority to
acquire and operate facilities
for service to various overseas points.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: June 29, 1995; Released: July 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a partial grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-324 IS GRANTED IN PART, and Cleartel Communications, Inc. (Cleartel) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix C, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix C, furnished by its correspondents;

e. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in Appendix D, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix D, furnished by its correspondents;

f. establish channels of communications between appropriately licensed U.S. earth stations and U.S. domestic satellites (also Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix E;

g. lease and operate any necessary domestic connecting facilities;

h. lease a one-half interest in and operate any necessary overseas connecting facilities; and

i. use the facilities in b, c, d and e, above, to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendices.

3. IT IS FURTHER ORDERED that neither Charter nor any persons or companies directly or indirectly controlling or controlled by Charter, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Cleartel or any persons or companies controlling or controlled by Cleartel are parties.

4. IT IS FURTHER ORDERED that our authorization of Cleartel to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, Cleartel may not -- and Cleartel's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-2, PAS-4, TDRS-41, TDRS-174, or Orion F1 satellites.

11. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

12. IT IS FURTHER ORDERED that action on Cleartel's request for authority to acquire Morelos and Solidaridad circuits to countries in addition to Mexico, is hereby deferred pending the outcome of the Notice of Proposed Rulemaking in *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, IB Docket No. 95-41, FCC 95-146, released April 25, 1995.

13. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

## APPENDIX A

### COUNTRIES TO BE SERVED VIA INTELSAT

| Country | Circuits | Country | Circuits | Country | Circuits |
|---|---|---|---|---|---|
| Argentina | 80 | Haiti | 80 | Poland | 80 |
| Australia | 80 | Honduras | 80 | Portugal | 80 |
| Austria | 80 | India | 80 | Romania | 80 |
| Bahamas | 80 | Indonesia | 80 | Saudi Arabia | 80 |
| Barbados | 80 | Iran | 80 | Senegal | 80 |
| Belgium | 80 | Ireland | 80 | Singapore | 80 |
| Bolivia | 80 | Israel | 80 | Somalia | 80 |
| Brazil | 80 | Italy | 80 | South Africa | 80 |
| Canada | 80 | Jamaica | 80 | Spain | 80 |
| Czech Republic | 80 | Japan | 80 | Sweden | 80 |
| Chile | 80 | Jordan | 80 | Switzerland | 80 |
| China, People's Republic | 80 | Kenya | 80 | Syria | 80 |
| Croatia | 80 | Korea, Republic of | 80 | Taiwan | 80 |
| Denmark | 80 | Kuwait | 80 | Thailand | 80 |
| Dominican Republic | 80 | Lebanon | 80 | Trinidad & Tobago | 80 |
| Ecuador | 80 | Liechtenstein | 80 | Uganda | 80 |
| Egypt | 80 | Luxembourg | 80 | United Arab Emirates | 80 |
| El Salvador | 80 | Malaysia | 80 | United Kingdom | 80 |
| Ethiopia | 80 | Mexico | 80 | Uruguay | 80 |
| Finland | 80 | Morocco | 80 | Vietnam | 80 |
| France | 80 | Netherlands | 80 | Venezuela | 80 |
| Guantanamo Bay | 80 | Netherlands Antilles | 80 | Slovenia | 80 |
| Germany, Federal Republic of | 80 | New Zealand | 80 | Zaire | 80 |
| Ghana | 80 | Nicaragua | 80 | Macedonia, FYRO | 80 |
| Greece | 80 | Norway | 80 | | |
| Guatemala | 80 | Panama | 80 | | |
| Guinea | 80 | Peru | 80 | | |
| Bosnia-Herzegovenia | 80 | Philippines | 80 | | |
| Serbia & Montenegro | 80 | | | | |

## APPENDIX B

### COUNTRIES TO BE SERVED VIA PAS-1

up to 24 64-kbps voice-grade circuits between the United States and the Dominican Republic.,and up to ten 64-kbps voice-grade circuits between the United States and the r countries listed below, not interconnected with the public switched network:

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzegovina
British Virgin Is.
Cayman Islands
Czech Republic
Denmark
France
Germany

Ireland
Italy

Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Fed.
Serbia & Montenegro
Spain
Sweden
Switzerland
Turks & Caicos Is.
United Kingdom
GreeceCroatia
Slovenia
Macedonia, FYRO

C-band Countries:

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Ecuador

Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

Up to 24 64 kbps voice-grade circuits between the United States and the Dominican Republic, and up to six 64-kbps voice-grade circuits between the United States and the other countries listed below, interconnected with the public switched network:

Ku-band Countries:

Azerbaijan
Bahamas
Bosnia-Herzegovina
Czech Republic
Portugal
Romania
Russian Fed.
Serbia & Montenegro
United Kingdom
Macedonia

C-Band Countries:

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

### COUNTRIES TO BE SERVED VIA PAS-2

Up to ten 64-kbps voice-grade circuits between the United States and the following country, not interconnected with the public switched network:
United Kingdom

Up to six 64-kbps voice-grade circuits between the United States and the following country, interconnected with the public switched network:
United Kingdom

### COUNTRIES TO BE SERVED VIA PAS-4

Up to ten 64-kbps voice-grade circuits between the United States and the following countries, not interconnected with the public switched network:

Australia
Hong Kong
New Zealand

Up to six 64-kbps voice-grade circuits between the United States and the following countries, interconnected with the public switched network:

Australia
Hong Kong
New Zealand

## APPENDIX C

### COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRSS

Up to ten 64-kbps voice-grade circuits between the United States and the countries listed below, not interconnected with the public switched network:

TDRSS-41

Austria
Bahamas
Belgium
Bosnia-Herzegovina
Canada
Denmark
Finland
France
Germany
Ireland
Israel
Jamaica
Liechtenstein
Luxembourg
Mexico
Netherlands
Portugal
Serbia & Montenegro
Sweden
Switzerland
Turkey
United Kingdom
Macedonia, FYRO

TDRSS-174

Hong Kong
Japan
Mexico
Philippines
Republic of Korea

Up to six 64-kbps voice-grade circuits between the United States and the countries listed below, interconnected with the public switched network:

| TDRS-41 | TDRS-174 |
|---|---|
| Germany | Hong Kong |
| Bosnia-Herzegovina | |
| Serbia & Montenegro | |
| United Kingdom | |
| Macedonia, FYRO | |

## APPENDIX D

### COUNTRIES TO BE SERVED VIA THE ORION F1 SATELLITE

Up to six 64 -kps voice-grade circuits between the United States and the countries listed below, interconnected with the public switched network:

Germany
Ireland
The Netherlands
Poland
Sweden

Up to ten 64-kbps voice-grade circuits between the United States and the countries listed below, not interconnected with the public switched network:

| | |
|---|---|
| Austria | Norway |
| Belgium | Poland |
| Denmark | Serbia & Montenegro |
| France | Sweden |
| Germany | The Netherlands |
| Ireland | United Kingdom |
| Italy | Macedonia, FYRO |
| Luxembourg | |

## APPENDIX E

### COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD) SATELLITES, AND ANIK SATELLITES

| | |
|---|---|
| Anguilla | Domestic Satellites |
| Antigua and Barbuda | Domestic Satellites |
| Bahamas | Domestic Satellites |
| Barbados | Domestic Satellites |
| Belize | Domestic Satellites |
| Bermuda | Domestic Satellites |
| British Virgin Islands | Domestic Satellites |
| Canada | Domestic Satellites, ANIK |
| Cayman Islands | Domestic Satellites |
| Dominica | Domestic Satellites |
| Grenada | Domestic Satellites |
| Grenadines | Domestic Satellites |
| MexicoDomSats, Morelos and Solidaridad | |
| Montserrat | Domestic Satellites |
| Netherlands Antilles | Domestic Satellites |
| St. Kitts & Nevis | Domestic Satellites |
| St. Lucia | Domestic Satellites |
| St. Vincent | Domestic Satellites |
| Turks & Caicos | Domestic Satellites |
| Venezuela | Domestic Satellites |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

**IC Docket No. 94-31**

Preparation for International
Telecommunication Union World
Radiocommunication Conferences

**ERRATUM**

**Released: July 14, 1995**

Report, FCC 95-256 (released June 15, 1995), is hereby corrected as follows:

1. To substitute the heading with:

By the Commission: Commissioner Chong issuing separate statement.

2. To correct the uplink frequency range provided in the first sentence of paragraph 68 by substituting the sentence with:

68. Our proposal is to make available for NGSO FSS networks the following bands: 500 MHz (satellite-to-earth direction) at 18.8-19.3 GHz and 500 MHz (earth-to-satellite direction) at 28.6-29.1 GHz for NGSO FSS networks.

3. And, to attach the Statement of Commissioner Chong.

These corrections will be reflected in text published in the *FCC Record*.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

## SEPARATE STATEMENT OF

## COMMISSIONER RACHELLE B. CHONG

*Re: Preparation for International Telecommunications Union World Radiocommunication Conferences, IC Docket No. 94-31*

It is with great pleasure that I support the recommendations we make today for the 1995 World Radiocommunication Conferences of the International Telecommunications Union ("WRC-95"). I write separately to emphasize my support for the efforts of the United States at WRC-95 to improve the international spectrum allocations and related measures necessary for the introduction of a global Mobile Satellite Service ("MSS"). If we are successful, these actions will advance implementation of low earth orbit and other MSS networks which have the potential to provide worldwide, cost efficient voice and data mobile communications services. These satellite networks are expected to play a key role in the development of a Global Information Infrastructure.

In the past year, I have had the honor of representing the United States at a number of international telecommunications conferences. As I discussed issues with delegates from around the world, it became apparent to me that many countries, especially developing countries, are as enthusiastic about the promise of MSS services as we are. We can garner their support. To do so, I believe it is imperative that the United States listen carefully to the legitimate concerns of other world representatives and affirmatively seek a global perspective when we adopt communications policies.

U.S. telecommunications companies are some of the world's leaders in developing new innovative technologies – particularly satellite technologies. These technologies have the potential to better the lives of all people by providing basic telecommunications and data services to people regardless of location, improving the economic productivity for nations, improving access to knowledge and social services, and increasing cultural understanding. As regulators, we must sweep away outdated barriers to full deployment of new communications technologies in order to realize this exciting potential.

The recommendations adopted in this item are, in large part, designed to reduce barriers to mobile satellite technology. It is my hope that our representatives will be able to persuade others at the WRC-95 to recognize the potential such services have to offer and adopt world policies to facilitate deployment of innovative communications systems.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-191**

In the Matter of

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|---|---|
| Amendment of Section 73.606(b), | RM-8088 |
| Table of Allotments, | |
| TV Broadcast Stations. | |
| (Pueblo, Colorado) | |

## REPORT AND ORDER

**Adopted: June 30, 1995; Released: July 14, 1995**

By the Chief, Allocations Branch:

1. The Commission has before it a *Notice of Proposed Rule Making* ("*Notice*")[1] issued in response to a petition filed jointly by the University of Southern Colorado ("USC"), licensee of noncommercial television Station KTSC(TV), Channel *8, Pueblo, Colorado, and Sangre De Cristo Communications, Inc. ("SCC"), licensee of commercial television Station KOAA-TV, Channel 5, Pueblo, Colorado (jointly, "petitioners"). The *Notice* proposes an exchange of television channel assignments between Station KTSC(TV) and Station KOAA-TV pursuant to Section 1.420(h) of the Commission's Rules, 47 C.F.R. § 1.420(h). Under this proposal, the Television Table of Allotments, 47 C.F.R. § 73.606(b), would be amended as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Pueblo, Colorado | 5, *8, 26+, 32- | *5, 8, 26+, 32- |

Thus, under the proposal, Channel 5 would be reserved for noncommercial educational use, and Channel *8 would be reserved.

2. Petitioners filed comments in response to the *Notice*, as did KKTV, Inc. ("KKTV"), licensee of commercial television Station KKTV(TV), Colorado Springs, Colorado, and Pikes Peak Broadcasting Company ("Pikes Peak"), licensee of commercial television Station KRDO-TV, Colorado Springs, Colorado, and commercial television Station KJCT-TV, Grand Junction, Colorado. Central Wyoming College ("CWC"), an applicant for a new noncommercial television station to operate on Channel *8 at Laramie, Wyoming,[2] also filed comments *ex parte*.[3] Petitioners, KKTV, and Pikes Peak filed reply comments.[4]

3. In addition, prior to the submission of comments in this proceeding, petitioners filed a Joint Motion to Consolidate Proceedings, requesting that a number of their pending application proceedings be consolidated with the instant rule making proceeding. KKTV and Pikes Peak filed oppositions to this motion, and petitioners filed a reply. These pleadings are currently before the Commission.

### THE NOTICE

4. We found in the *Notice* that petitioners' proposal appeared to meet the Commission's requirements for channel exchanges between a noncommercial educational television station and a commercial television station,[5] but we also expressed concern with respect to several matters. First, we observed that USC held a construction permit to modify Station KTSC(TV)'s facilities by relocating its main transmitter from its present site at Baculite Mesa to a site at Cheyenne Mountain, and that SCC wished to operate Station KOAA-TV from the construction permit site rather than from USC's licensed site. However, the Cheyenne Mountain construction permit site is short spaced to Station KJCT(TV), Channel 8, Grand Junction, Colorado, and to vacant Channel 8 at Laramie, Wyoming.[6] Although USC had been granted a waiver of the minimum distance separation requirements of Section 73.610(b) in order to construct facilities for its noncommercial station at the Cheyenne Mountain site, we stated in the *Notice* that it would not be appropriate to decide at the allotment rule making stage whether such a waiver request by a commercial licensee would be granted.[7] We therefore did not propose to modify SCC's authorization for Station KOAA-TV to specify the Cheyenne Mountain construction permit site, as SCC desired, but instead proposed to modify Station KOAA-TV's authorization to specify Station KTSC(TV)'s licensed site at Baculite Mesa.[8]

5. Second, USC had previously stated, in connection with its application to modify Station KTSC(TV)'s transmitter site, that it needed to move to the short-spaced site at Cheyenne Mountain in order to provide noncommercial educational television service to Colorado Springs without relying on a translator.[9] Now, however, petitioners propose

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[1] 8 FCC Rcd 4752 (1993).
[2] File No. BPET-921210KE.
[3] CWC's comments did not include a certificate indicating that a copy had been served on petitioners' counsel. Nonetheless, in the interest of assembling a complete record, we have considered these comments.
[4] Petitioners have also submitted a number of letters from community leaders supporting the proposed channel exchange.
[5] As we noted, both stations operate within the same band and serve the same community of license. USC has stated that it would use the proceeds from the exchange solely to improve the service of Station KTSC(TV), and a public benefit could be obtained through the exchange. *Notice*, 8 FCC Rcd at 4753. *See also* 47 C.F.R. § 1.420(h); *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 59 RR 2d 1455 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988) ("*Intraband Television Channel Exchanges*").
[6] As already noted, CWC has filed an application for a new noncommercial educational station on Channel *8 at Laramie. *See supra* note 2.
[7] *Notice*, 8 FCC Rcd at 4753 n.5.
[8] *Id.* at 4753.
[9] USC at one time used a translator station on Channel 53 to provide service to Colorado Springs, but in 1990 was required to cease operation on that channel due to the initiation of operations by a full power station. USC now operates translator

that USC operate from Station KOAA-TV's licensed site, which is, like the present licensed site of Station KTSC(TV), located at Baculite Mesa. Noting that, according to petitioners' engineering exhibit, shadowing occurs in Colorado Springs from this site, thus necessitating the use of a translator to provide service to that city, we observed in the *Notice:* "[W]e do not believe it is generally desirable to replace primary service to that community, as contemplated in connection with USC's waiver request, with a secondary service which could ultimately be forfeited to a full service television operation. . . ."[10] We further stated that we would question the public interest benefits of the channel exchange proposal if USC planned to discontinue service to Colorado Springs.[11]

6. Third, most of the potential gain in noncommercial reception service represented in petitioners' proposal would depend on theuse of translators. According to petitioners, the proposed channel exchange would enable Station KTSC(TV) to provide new noncommercial reception service to 299,897 persons. However, this number includes 211,633 persons who would receive their first educational service as a result of USC's use of SCC's translator Station K30AA, which SCC would donate to USC as a condition of the channel exchange. In addition, 82,871 persons would receive Station KTSC(TV) as their first over-the-air educational service only through translator stations at Grand Junction and Durango, which, petitioners have stated, USC plans to construct using funds contributed to it by SCC in the channel exchange.[12] Because it is the Commission's policy to treat translators as secondary services for purposes of spectrum priority, USC's projected translator expansion would not be protected from the operation of a full service station. For this reason, we stated in the *Notice* that USC's projected population gains related to its proposed operation of translator stations at Colorado Springs, Grand Junction, and Durango might be too speculative to be considered in the context of this rule making proceeding and that we may not consider such gains as part of the overall benefits of the proposal.[13]

## JOINT MOTION TO CONSOLIDATE PROCEEDINGS

7. Before considering the channel exchange proposal at issue here, we must address petitioners' Joint Motion to Consolidate Proceedings. The application proceedings petitioners wish to have consolidated with the instant channel exchange rule making proceeding involve (1) SCC's application for reinstatement of its construction permit for television translator Station K15BX, Colorado Springs;[14] (2) SCC's application for an extension of time to construct Station K15BX;[15] (3) SCC's application for an extension of its STA to rebroadcast Station KTSC(TV) on translator Station K15BX; (4) USC's application for an extension of time to construct modified facilities at Cheyenne Mountain;[16] (5) petitioners' application to assign the Cheyenne Mountain construction permit to SCC;[17] and (6) four applications for new UHF translator stations filed by USC.[18] According to petitioners, all of the pleadings filed in connection with these applications involve the same facts and issues and are ultimately related to the public interest merits of the proposed channel exchange. For these reasons, they argue, there is no need for the Commission to issue multiple decisions.[19] Petitioners also assert that the pleadings filed by KKTV and Pikes Peak against these applications have been submitted for the purpose of delaying a decision on the merits of the channel exchange, and that justice requires that this delay be avoided through consolidation.[20]

8. KKTV and Pikes Peak oppose petitioners' motion to consolidate on the grounds that the various application proceedings included in the motion are unrelated or only marginally relevant to the rule making proceeding, and that consolidation would add issues needlessly to the rule making proceeding and delay a decision.[21] KKTV further states that, if the Commission consolidated the proceedings, it would have to permit interested parties additional time to file comments and reply comments with respect to the additional issues in the consolidated proceeding or deny parties the right to comment on the consolidated proceeding.[22] In reply, petitioners point to several facts that they claim demonstrate the connection between the application proceedings and the channel exchange proposal: (1) KKTV and Pikes Peak expressed no opposition to Station KTSC(TV)'s Cheyenne Mountain construction permit or SCC's construction permit for translator Station K15BX until the channel exchange was proposed; (2) KKTV and Pikes Peak devoted substantial portions of their comments in the instant rule making proceeding to discussions of these construction permits; and (3) the *Notice* in this proceeding referenced the pendency of the Cheyenne Mountain construction permit extension request and the Station K15BX STA.[23] Petitioners also assert in their reply that consolidation would not result in delaying the rule making proceeding and would not necessitate the submission of further comments because all issues have already been fully briefed.[24]

9. We are not persuaded that the consolidation of proceedings requested by petitioners would be appropriate. Petitioners have not demonstrated, as they claim, that the proceedings included in their motion involve the same facts and issues, and we find that the application proceedings they have included are either unrelated to their channel exchange proposal or involve primarily legal issues and/or factual questions that fall outside the scope of this

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Station K15BX to serve Colorado Springs. USC's operation of Station K15BX is effected pursuant to special temporary authority ("STA").

[10] *Notice*, 8 FCC Rcd at 4753.

[11] *Id.*

[12] *See infra* note 18 and para. 13.

[13] *Notice*, 8 FCC Rcd at 4754.

[14] File No. BMPTT-911105JE.

[15] File No. BMPTT-921002JE.

[16] File No. BPET-930216KE.

[17] File No. BAPET-930902KE.

[18] These applications are for UHF translator stations at Grand Junction, Colorado (File No. BPTT-930330CC); Cortez-Red Mesa, Colorado (File No. BPTT-930330CA); Durango, Colorado (File No. BPTT-930330CB); and Ignacio, Colorado (File No. BPTT-930330CD).

[19] Joint Motion to Consolidate Proceedings at 3.

[20] *Id.* at 5.

[21] Opposition of KKTV, Inc. to Joint Motion to Consolidate Proceedings at 2-6; Pikes Peak Opposition to Joint Motion to Consolidate Proceedings at 2-5.

[22] Opposition of KKTV, Inc. to Joint Motion to Consolidate Proceedings at 5.

[23] Joint Reply to Oppositions to Joint Motion to Consolidate Proceedings at 3-5.

[24] *Id.* at 6.

proceeding. Moreover, contrary to petitioners' assertions, the issues raised by the application proceedings are not germane to our public interest analysis of the instant channel exchange proposal.

10. SCC's applications having to do with translator Station K15BX are unrelated to this proceeding. SCC obtained the construction permit for this station in 1987, well before it sought to exchange channels with USC, in anticipation of the possible displacement of its translator Station K30AA. The fact that USC operates this station pursuant to an STA does not, by itself, mean that SCC's applications to reinstate and extend the construction permit for Station K15BX, and to extend the STA under which it is operated, should be considered in conjunction with this rule making proceeding. SCC has not shown that there is any connection between Station K15BX and the proposed channel swap, or any of its potential public interest benefits, and our mention in the *Notice* of Station K15BX in our description of the current circumstances of Station KTSC(TV)'s operation does not establish such a link.

11. Turning to USC's application for an extension of time to construct at Cheyenne Mountain, we note that USC applied for its construction permit to relocate its main transmitter to a site on Cheyenne Mountain prior to requesting the channel exchange with SCC, stating that it needed to make this modification in order to provide noncommercial educational television service to Colorado Springs without relying on a translator station. In its comments in this proceeding, USC has affirmed that it remains interested in relocating its transmitter to the Cheyenne Mountain site if the channel exchange with SCC is not approved.[25] The fact that USC and SCC now wish to include the Cheyenne Mountain construction permit in their proposed exchange so that SCC may relocate to that site does not warrant consolidating USC's extension request with this proceeding. Although, as we have stated, USC's involvement in this rule making proceeding may provide a basis for extending Station KTSC(TV)'s construction permit, the issue of whether or not USC has satisfied the requirements of Section 73.3534 of the Commission's Rules for obtaining an extension of the permit also involves other questions unrelated to this proceeding. Moreover, as we indicated in the *Notice*, it would not be appropriate for us to decide, in the context of a rule making proceeding to amend the TV Table of Allotments, whether a construction permit that includes a waiver of the minimum spacing rules should be transferred from a noncommercial station to a commercial station. Thus, whether or not USC obtains an extension of the Cheyenne Mountain construction permit, the permit may not be included in the channel exchange and would not affect the public interest analysis of any channel exchange proposal we would approve.

12. Petitioners' application for FCC consent to the assignment of the Cheyenne Mountain construction permit from USC to SCC should also be examined independently of the instant proceeding. We do not agree with petitioners' assertions that the issues involved in deciding whether SCC should receive this permit are identical to the issues that were involved in granting the permit to USC.[26] The Cheyenne Mountain construction permit, including its minimum spacing waiver, was granted to USC largely on the basis of USC's need to provide television service to the area that it is responsible for serving through its educational programs. This factual basis for our grant to USC would not, of course, apply to SCC. Moreover, there is now an application pending for a new station on Channel *8 at Laramie, Wyoming, a circumstance which did not exist when we granted the construction permit to USC. In addition, as we discuss more fully below, it would be contrary to well-established Commission policy to grant a minimum spacing waiver at the allotment stage. We therefore conclude that petitioners' assignment application should be examined on its merits separately from the instant rule making proceeding.

13. USC's applications for new translator stations should also be considered separately from this proceeding. As we indicated in the *Notice*, we may not consider any speculative gains in coverage attributable to translators in our public interest analysis of the channel swap proposal.[27] Moreover, we note that, although petitioners state in their joint comments and reply comments in the channel exchange proceeding that USC will use funds contributed by SCC to construct these translators, USC has gone forward with its translator applications independently of this proceeding, certifying to its financial ability to construct and operate the stations and apparently intending to do so whether or not the channel exchange with SCC is approved.[28] Thus, there is no factual or legal reason for consolidating the translator applications with this proceeding.

14. In light of the factors discussed above, we will deny petitioners' Joint Motion to Consolidate Proceedings and, in keeping with this decision, we will not consider herein the various arguments presented by the commenters in this proceeding regarding the merits of USC's request to extend the Cheyenne Mountain construction permit. Although we touched briefly on this issue in the *Notice*, we now find that it falls outside the scope of this proceeding.

## CHANNEL EXCHANGE PROPOSAL

15. *Comments*. Turning to the channel exchange proposal itself, we first consider petitioners' contention that the Cheyenne Mountain construction permit must be included in the exchange. In their joint comments filed in response to the *Notice*, petitioners assert that our exclusion of the Cheyenne Mountain permit from our channel exchange proposal is unwarranted and contrary to law on a number of grounds.[29] Thus, petitioners note that, when the Commission adopted Section 1.420(h) of its rules, it specifically provided that permittees could be parties to channel exchanges, and they argue that it necessarily follows from this that permits for unbuilt modifications must be transferred

[25] Joint Reply Comments at 28-29.

[26] In their Joint Motion to Consolidate Proceedings, petitioners argue generally that all of the proceedings they wish to have consolidated involve the same issues, without specifically explaining how this might be the case. In their comments in response to the *Notice*, they contend specifically that the issues that would be involved in considering a grant of the permit to SCC would be those that were involved in considering the grant to USC. *See infra* para 16.

[27] *Notice*, 8 FCC Rcd at 4754.

[28] *See supra* note 18.

[29] Joint Comments at 3-9; Joint Reply Comments at 10-14.

in connection with channel exchanges.[30] Petitioners further assert that the Commission has routinely approved channel exchanges involving outstanding construction permits for unbuilt stations, that no previous approvals of channel exchanges involving authorizations for unbuilt facilities have depended on prior implementation of the permits,[31] and that the transmitter relocation sought by SCC is no different from other such relocations obtained by commercial licensees in channel swaps approved by the Commission.[32]

16. Petitioners also argue in their comments that inclusion of the Cheyenne Mountain construction permit is the only "sensible result" here because, if the permit is excluded, the parties to the exchange will have to file an application for consent to assign the permit to SCC, or SCC will have to file a modification application to relocate to Cheyenne Mountain.[33] In either case, petitioners claim, the Commission will be required to address issues it has already considered in granting the permit to USC. According to petitioners, the Commission has already decided that operation of a television station on Channel 8 from Cheyenne Mountain is in the public interest, and the short-spacing waiver granted to USC should not be reevaluated to determine whether SCC may also make use of the waiver.[34] Indeed, according to petitioners, the Commission, having made a determination that the waiver for USC was in the public interest, is bound under the doctrine of *res judicata* to grant the same waiver to SCC. Petitioners further argue that Section 73.610 is a technical rule and that, under well-established Commission policy, waivers of technical rules should not be based on nontechnical considerations. To base such a waiver on the commercial or noncommercial status of a station would, they contend, be contrary to the First Amendment, Section 326 of the Communications Act of 1934, as amended, and judicial precedent.[35] Based on these arguments, petitioners assert that the fact that the Cheyenne Mountain permit contains a short-spacing waiver is not an impediment to inclusion of the permit in the channel exchange.

17. Finally, petitioners state that SCC's continued interest in the channel exchange at issue here is conditioned upon inclusion of the Cheyenne Mountain construction permit.[36]

18. In its comments, KKTV states that our decision in the *Notice* not to include the Cheyenne Mountain construction permit in our channel exchange proposal was correct. According to KKTV, the construction permit for Cheyenne Mountain should be extended only for the use of USC or not extended at all, and USC should not be allowed to abandon the commitment it made to provide primary service to Colorado Springs by now turning over the Cheyenne Mountain construction permit to SCC.[37] KKTV argues that the cases cited by petitioners as precedent for inclusion of the Cheyenne Mountain permit are inapposite here, stating in particular that the channel exchange approved in *Gary, Indiana*, did not result in a commercial station acquiring a short-spaced site that had been granted to a noncommercial station.[38] KKTV also asserts that the minimum spacing waiver granted to USC was based on unique facts, that entirely different public interest considerations would be involved if SCC were to apply for such a waiver, and that it is therefore absurd to claim, as petitioners do, that no new issues would be raised by a waiver application filed by SCC.[39] In addition, KKTV states that petitioners are wrong in claiming that the Commission must consider only technical issues in granting minimum spacing waivers, and in claiming that a grant of the waiver in question here to SCC would be required by the doctrine of *res judicata*. With respect to the latter claim, KKTV argues that the doctrine of *res judicata* would not be applicable to a waiver request by SCC because, *inter alia*, SCC was not a party to the USC waiver request proceeding.[40] Finally, KKTV argues that the Commission's consideration of the nature of a station's programming as a public interest factor in minimum spacing waiver decisions is not unconstitutional, and asserts that USC, which specifically argued that it should receive its requested waiver because it provides educational programming, should not now complain that the consideration of this factor is unconstitutional.[41]

19. Pikes Peak, in its comments, also agrees with our determination in the *Notice* that the Cheyenne Mountain construction permit should not be included in a channel exchange between USC and SCC. According to Pikes Peak, the Commission's grant of the minimum spacing waiver to USC was based on Station KTSC(TV)'s status as a noncommercial educational facility, and the short-spacing rules would be circumvented if SCC were allowed to obtain the permit.[42] In Pikes Peak's view, the exchange proposal would "destroy the expanded noncommercial coverage" that was the basis for granting USC the Cheyenne Mountain permit, and replace it with "minimally improved coverage from secondary, displaceable facilities."[43] In its reply comments, Pikes Peak reiterates its view that the proposed exchange is not in the public interest because the objective of the Commission's channel exchange policy is to improve noncommercial coverage and USC can improve its coverage only by operating at Cheyenne Mountain.[44] Pikes Peak further asserts that there is nothing in the FCC's exchange policy order or any other

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[30] Joint Comments at 4-6.

[31] *Id.* at 6-8.

[32] Joint Reply Comments at 11-14. Petitioners cite, *inter alia*, *Gary, Indiana*, MM Docket No. 86-80, 51 Fed. Reg. 30,864 (1986), *petition for recon. dismissed*, 1 FCC Rcd 975 (1986), *Clermont and Cocoa, Florida*, 4 FCC Rcd 8320 (M.M.B. 1989), and *Boca Raton and Lake Worth, Florida*, 8 FCC Rcd 6189 (M.M.B. 1993) -- cases in which the Commission approved channel exchanges involving construction permits for unbuilt facilities -- in support of their assertion that we are bound by precedent to include the Cheyenne Mountain construction permit in the channel exchange at issue here.

[33] Joint Comments at 5-6 n.7. As already noted, petitioners in fact have filed an application for FCC consent to the assignment of the permit from USC to SCC. This application was filed on September 2, 1993, one day before the deadline for filing comments in the instant proceeding. *See supra* note 17.

[34] Joint Comments at 5 n.7.

[35] *Id.* at 14-17. However, petitioners cite no case law in support of this contention.

[36] Joint Comments at 3 n.3; Joint Reply Comments at 4-5.

[37] KKTV Comments at 11-21.b

[38] KKTV Reply Comments at 2-5.

[39] *Id.* at 5-6.

[40] *Id.* at 12-15.

[41] *Id.* at 16-17.

[42] Pikes Peak Comments at 2-3.

[43] *Id.* at 9.

[44] Pikes Peak Reply Comments at 2-3.

authority cited by petitioners that obligates the Commission to include a short-spaced construction permit site in a channel exchange.[45] In its comments, Pikes Peak concludes that petitioners' channel exchange proposal should be denied but does not oppose the proposal as set forth in the *Notice*. In its reply comments, Pikes Peak requests that the Commission dismiss the *Notice* in its entirety, based on petitioners' statement that they will not pursue the exchange as proposed therein, or grant the exchange only as proposed in the *Notice*.[46]

20. CWC expresses no opinion as to the merits of the channel exchange proposed in the *Notice* but opposes SCC's request that it be authorized to operate from the Cheyenne Mountain construction permit site, which, according to CWC, is short-spaced to both the Laramie reference coordinates and CWC's proposed transmitter site. CWC states that its proposed station would provide the first over-the-air noncommercial television service to a substantial portion of southeastern Wyoming, including the state capital, Cheyenne.[47]

21. *Discussion.* Petitioners are correct in stating that the intraband channel exchange procedures of Section 1.420(h) of the Commission's Rules are available to permittees. However, we do not agree with petitioners' assertion that, merely because a permittee of an unbuilt station could be a party to a channel exchange, it therefore follows that a construction permit for the modification of licensed facilities "must" be transferred in connection with a channel exchange proposal.[48] Nothing in Section 1.420(h) or the Commission's policies underlying that rule requires the transfer of a construction permit held by a licensee for the modification of its facilities as part of a channel exchange. Moreover, petitioners make far too much of the fact that the Commission recognized when it adopted Section 1.420(h) that intraband channel exchanges could result in benefits for both noncommercial and commercial stations. This recognition does not mean, as petitioners suggest, that the Commission intended in adopting its channel exchange procedures to ensure a benefit for commercial stations.[49] Indeed, the Commission clearly stated when it adopted Section 1.420(h) that its primary purpose in doing so was to enable noncommercial educational stations to improve their service.[50] In upholding the channel exchange policy, the U.S. Court of Appeals for the District of Columbia Circuit also explained that the Commission adopted the policy "as a rescue effort for educational broadcasting in the wake of decreases in federal funding" and repeatedly referred in its opinion to the FCC's goal of promoting educational television by making it easier for educational channels to raise money through channel exchanges.[51] We assume that commercial stations will request channel exchanges with noncommercial stations when it is in their interest to do so, but Commission policy in no way requires that the commercial party to a channel exchange receive any particular benefit in order for the exchange to be in the public interest.[52]

22. Petitioners' contention that Commission precedent requires inclusion of the Cheyenne Mountain construction permit in the channel exchange proposal under consideration is also wrong. Petitioners cite cases in which the Commission has approved exchanges that benefited commercial stations, suggesting that these cases somehow support the proposition that SCC is entitled to the benefit it seeks through the exchange. However, the case law does not support such a proposition. Moreover, petitioners' claim that the benefit SCC seeks is no different from the benefits obtained by other commercial stations whose channel exchange proposals have been approved is also inaccurate. As petitioners correctly state, the Commission has approved channel exchanges involving construction permits for unbuilt stations, allowing commercial stations to relocate their transmitters to construction permit sites. However, Commission case law does not require us to approve a channel exchange that would result in a commercial station moving to a site at which it would be short-spaced.[53]

23. Moreover, the grant of a minimum spacing waiver in connection with petitioners' request to amend the TV Table of Allotments would be inconsistent with well-established Commission policy.[54] The Commission has denied

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[45] *Id.* at 7-8.
[46] *Id.* at 1-2, 10.
[47] CWC Comments at 1-2.
[48] *See* Joint Comments at 4-5.
[49] *See* Joint Reply Comments at 10.
[50] *See Intraband Television Channel Exchanges*, 59 RR 2d at 1464a.
[51] *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 406, 409, 410 (D.C. Cir. 1991). The Commission's interest in assisting noncommercial educational stations in particular through its channel exchange procedures is reflected in Section 1.420(h) itself, which does not apply to exchanges between two commercial stations, but only to exchanges to which a noncommercial station is a party, and in various aspects of the Commission's order adopting Section 1.420(h). Thus, for example, the Commission explained in adopting the rule that it would apply Section 1.420(h) to permittees in order to help noncommercial permittees build their stations and that it would accord significant weight to determinations made by directors of public stations in assessing the public interest benefits of a proposal. *Intraband Television Channel Exchanges*, 59 RR 2d at 1464a.
[52] We note that in upholding the Commission's decision to approve a channel exchange in *Clermont and Cocoa, Florida*, 4 FCC Rcd 8320 (M.M.B. 1989), *aff'd*, 5 FCC Rcd 6566 (1990), the Court of Appeals concluded that the FCC properly determined that the exchange served the public interest and further explained that the money obtained by the noncommercial station "allows an educational channel to operate where it otherwise would not have. Cash infusion is stated in the Policy to be one way to promote the public interest, and the Policy does not require that exchanges promote the public interest in more than one way." *Rainbow Broadcasting*, 949 F.2d at 413.
[53] Petitioners assert pointedly that the Commission has approved exchanges that allowed commercial stations to move their transmitters to sites where they would have been prohibited from moving by the Commission's minimum distance separation requirements if they had continued to broadcast on the channel originally assigned to them. Contrary to the conclusion petitioners draw, the approval of such an exchange would in no way support our approval of an exchange resulting in a move to a short-spaced site.
[54] Petitioners assert that in the *Notice* the Commission excluded the Cheyenne Mountain permit from its channel exchange proposal solely because USC had not implemented the permit, without mentioning the minimum distance separation rules. Joint Reply Comments at 13 n.32. This characterization of the *Notice* is inaccurate. In making its proposal based on the coordinates of USC's and SCC's licensed facilities at Baculite Mesa, the Commission specifically noted that SCC can operate Station KOAA-TV on Channel 8 at USC's licensed site in conformity with the minimum distance separation rules, whereas the allotment of Channel 8 at Cheyenne Mountain would be

the vast majority of requests for short-spaced allotments because it has "a strong interest in preserving the integrity of the Table of Allotments and the mileage separation criteria upon which the Table is based."[55] As the Commission has explained, "[s]trict adherence to the spacing requirements reflected in the Table is 'necessary . . . in order to provide a consistent, reliable and efficient scheme of [allotments].'"[56] In the rare cases in which the Commission has granted short-spaced allotments, it did so based on highly unusual circumstances. Thus, in the *VHF Drop-In Proceeding*, the Commission granted four requests for short-spaced allotments that resulted in service gains of more than 500,000 persons with minimal service interference or loss.[57] The Commission explained at the time that short-spaced allotments would be permitted only where there was a large public benefit to be gained at minimal cost.[58] We have continued since then to apply this principle, requiring that the public interest benefits of the short-spaced allotment be large enough to outweigh the public interest benefit of the minimum spacing rules.[59] In applying this policy, the Commission has also explained: "Absent a demonstration of compelling need for departure from established interstation separation standards, the Commission will not grant a waiver of the minimum spacing rules for allotment purposes."[60]

24. In the instant proceeding, petitioners have not made a showing of compelling need to support their request for a short-spaced allotment, nor are we dealing here with an extraordinary situation. This is an ordinary case in which petitioners understandably seek to improve their coverage of certain geographical areas, but the public interest benefits that would be derived from the short-spaced allotment they seek are not large enough to outweigh the public interest benefit of the integrity of the TV Table of Allotments and the minimum spacing rules. As we have already indicated, most of the noncommercial service gains to be derived from the channel exchange proposal would be achieved through translators, which may be displaced by full power stations. Thus, such gains might have to be forfeited at any time, and it would be inappropriate for us to consider them here. Moreover, even if it were appropriate for us to consider Station KTSC(TV)'s projected gains in secondary service in our assessment of the public interest benefits of the proposed channel exchange, USC has already applied for construction permits for translators at Grand Junction and Durango. It appears, therefore, that USC plans to expand its service to the Western Slope of Colorado by means of these translators whether or not the proposed channel exchange is approved, and the exchange is not needed to accomplish this expansion. If the exchange were approved, only 5,398 persons would gain a new noncommercial service that is not attributable to translators.

25. Opponents of petitioners' proposed channel exchange also argue that the exchange would not be in the public interest for other reasons. According to KKTV, for example, 29,367 people would lose their only off-air primary commercial service as a result of the exchange if SCC were permitted to operate Station KOAA-TV from Cheyenne Mountain, while only 2,906 viewers would receive their first off-air primary noncommercial service from Station KTSC(TV). Arguing that any loss of service is *prima facie* inconsistent with the public interest, KKTV contends that the large losses involved here are contrary to the public interest.[61] KKTV also states that any improvements in noncommercial service as a result of the translator service proposed by petitioners would be marginal, in part because many of the people the translators would reach already receive educational television through cable.[62] Petitioners, on the other hand, assert that any loss of commercial service caused by their proposed exchange would be *de minimis* and would be outweighed by the noncommercial service gains to be realized.[63]

26. We find that it is unnecessary to resolve all of the various points in dispute between petitioners and other commenters as to how the potential losses and gains in service should be evaluated in this case. It is apparent that USC has decided to go forward with its translator expansion on the Western Slope independently of the proposed channel exchange. Moreover, even if we were to consider as part of our public interest analysis the translator stations petitioners claim USC would build or acquire as a result of their proposed exchange – *i.e.*, stations at Colorado Springs, Durango, and Grand Junction –, we would be forced to recognize that these stations could provide only secondary service. In light of this fact, and given the very small number of people that would gain a new noncommercial service that is not attributable to translators, we conclude that the public benefits to be gained by including the Cheyenne Mountain construction permit in the proposed channel exchange fall far short of the large benefits the Commission has required in order to grant a short-spaced allotment.

27. Petitioners have stated that SCC's continued interest in the proposed channel exchange is conditioned upon inclusion of the Cheyenne Mountain construction permit in the exchange proposal ultimately approved by the Commission. As explained above, however, we find that inclusion of the Cheyenne Mountain construction permit would not be in the public interest. Accordingly, the channel

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short-spaced, and the Commission further stated that it was not appropriate to consider a short-spacing request at the rule making stage. *Notice*, 8 FCC Rcd at 4753.

[55] *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572, 5572 (1990).

[56] *Id.* (citing *Millington, Maryland*, 45 RR 2d 1689, 1690-91 (1979)).

[57] *Petition for Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets and to Assure That the New Stations Maximize Diversity of Ownership, Control and Programming, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 63 F.C.C.2d 840 (1977), *Report and Order*, 81 F.C.C.2d 233, 261-67 (1980), *recon. denied*, 90 F.C.C.2d 160 (1982).

[58] 63 F.C.C.2d at 855.

[59] *See, e.g., London, Kentucky*, 7 FCC Rcd 5936, 5937 (M.M.B. 1992).

[60] *Id. See also Portland, Tennessee*, 35 F.C.C.2d 601, 602 (1972) (explaining that minimum spacing waiver at rule making stage could only be considered in an "extraordinary situation"); *Toms River, New Jersey*, 43 F.C.C.2d 414, 417-18 (1973) (finding that absent "special justification," there is no public interest basis for proposing short-spaced allotment).

[61] KKTV Reply Comments at 18-19.

[62] KKTV Comments at 8-10.

[63] Joint Reply Comments at 14-20.

exchange proposal presented in the *Notice* will not be modified to include this permit. In light of petitioners' lack of interest in pursuing the proposal as set forth in the *Notice*, there is no need to consider further whether this proposal would be in the public interest .

28. Accordingly, IT IS ORDERED, That the Joint Motion to Consolidate Proceedings filed by the University of Southern Colorado and Sangre De Cristo Communications, Inc., IS DENIED.

29. IT IS FURTHER ORDERED, That the petition for rule making to exchange channels filed by the University of Southern Colorado and Sangre De Cristo Communications, Inc., IS DENIED.

30. For further information concerning this proceeding, contact Diane Conley, Mass Media Bureau, (202) 776-1653.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**COMMENTS SOUGHT ON ALASCOM, INC**
**REVISED COST ALLOCATION PLAN**
**CC DOCKET NO. 83-1376, RM 4436**
**AAD 94-119**

**PUBLIC COMMENT INVITED**

**Released: July 14, 1995**

**Comment Date: July 27, 1995**
**Reply Date: August 7, 1995**

On July 3, 1995 Alascom Inc. ("Alascom") filed a revised Cost Allocation Plan ("CAP") pursuant to the Ordering Clause in paragraph 22 of the Commission's Order, DA 95-971, released May 4, 1995.

Parties may file comments on Alascom's CAP filing no later than **July 27, 1995**. Replies should be filed by **August 7, 1995**. Comments should reference AAD 94-119. Six (6) copies of each pleading should be sent to Kenneth M. Ackerman, Chief, Accounting Systems Branch, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and one (1) copy of each pleading should also be sent to the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3600. Copies of Alascom's CAP filing are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

This is a non-restricted proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§1.1200-1.1216.

For further information, contact Kenneth M. Ackerman at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAS TELECOM, INC. File No. I-T-C-94-267

Application for authority
under Section 214 of the
Communications Act of 1934,
as amended, to operate
channels of communication
via the Solidaridad satellite
system between the United
States and other locations

**ORDER AND AUTHORIZATION**

**Adopted: June 29, 1995; Released: July 14, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its partial grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-267 IS PARTIALLY GRANTED and Americas Telecom, Inc. ("ATI") is authorized to:

a. establish channels of communication between appropriately-licensed transmit/receive earth stations in the United States and the Solidaridad satellite system, connecting with similar circuits between the satellite and earth stations in Mexico; and

b. use the above facilities to provide transborder services consulted pursuant to Article XIV(d) of the INTELSAT Agreement, including, but not limited to, private line, facsimile, and data services.[1]

3. IT IS FURTHER ORDERED that our authorization of ATI to provide private lines as part of the services authorized herein is limited to the provision of such private lines only between the United States and Mexico--that is, private lines which originate in the United States and terminate in Mexico or which originate in Mexico and terminate in the United States. In addition, ATI may not--and its tariff must state that its customers may not--connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic switched services unless authorized to do so by the Commission upon a finding that Mexico afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither ATI nor any persons or companies directly or indirectly controlling or controlled by ATI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which ATI or any persons or companies controlling or controlled by ATI are parties.

5. IT IS FURTHER ORDERED that ATI shall be regulated as nondominant in the provision of its authorized services between the United States and Mexico.

6. IT IS FURTHER ORDERED the applicant shall file copies of any operating agreements, including the applicable accounting rate, it enters into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via the Solidaridad satellite system is subject to limitations on the number of circuits specified in applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. IT IS FURTHER ORDERED that action on ATI's request for authority to acquire Solidaridad circuits to countries in addition to Mexico, is hereby deferred pending the outcome of the Notice of Proposed Rulemaking in *Amendment to the Commission's Regulatory Policies Governing Domestic fixed Satellites and Separate International Satellite Systems*, IB Docket No. 95-41, FCC 95-146, released April 25, 1995.

11. This order is issued pursuant to Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] ATI's application requested authority to provide voice services. By letter dated February 16, 1995, ATI stated that switched voice services would not be provided.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-108**

In the Matter of

Amendment of Section 73.202(b) RM-8631
Table of Allotments
FM Broadcast Stations
(Ankeny and West Des Moines,
Iowa)

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: June 29, 1995; Released: July 14, 1995**

**Comment Date: September 5, 1995**
**Reply Comment Date: September 20, 1995**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Fuller-Jeffrey Broadcasting Corporation of Greater Des Moines ("Fuller-Jeffrey"), licensee of Station KJJY-FM, Channel 223C2, Ankeny, Iowa, proposing the reallotment of Channel 223C2 from Ankeny to West Des Moines, Iowa, and the modification of Station KJJY-FM's license to specify West Des Moines, Iowa, as its community of license.

2. Petitioner states that its petition complies with the requirements set forth in §1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.[1] *See Modification of FM License*, 4 FCC Rcd 4870(1989), recon. granted in part, 5 FCC Rcd 7094 (1990). Petitioner states that the requested reallotment to West Des Moines is mutually exclusive with the existing allotment of Channel 223C2 at Ankeny, Iowa. Petitioner further states that the public interest would be served by the reallotment since it would provide West Des Moines with its first local aural transmission service[2] while Ankeny would retain local aural transmission service through vacant but applied for Channel 292A. Petitioner states that no change in transmitter site is required since the station will be able to place a city grade signal, 70dBu contour, over West Des Moines from its present site.[3]

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. Contrary to petitioner's claim, its proposal will not provide West Des Moines with a first local transmission service, but could result in a second local service.[4] This is due to the fact that non-commercial FM Station KWDM, Channel 204A is licensed to Ankeny, and non-commercial FM stations are now counted as transmission and reception services for purposes of Section 307(b) allotment comparison. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd at 7097 and n.19; *Valley Broadcasters, Inc.* 5 FCC Rcd 2785 (1990); *Channel 32 Broadcasting Company* 6 FCC Rcd 5188 (1991), *recon. denied*, 7 FCC Rcd 1694 (1992). However, we also note that, according to the 1990 U.S. Census, West Des Moines is located within the Urbanized Area of Des Moines, Iowa. In light of the above, we question whether West Des Moines should be credited with all of the aural transmission services licensed in the Des Moines Urbanized Area or whether the instant proposal should be considered as a second local transmission service for West Des Moines. Petitioner is requested to submit information sufficient to show that West Des Moines is deserving of such a preference using the Commission's three factors enumerated in *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990) and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) and *Elizabeth City, North Carolina, and Chesapeake, Virginia*, 9 FCC Rcd 3586 (1994).[5] Finally, we encourage the petitioner to submit any additional information regarding the public interest benefits that would accrue from the reallotment of Channel 223C2 to West Des Moines, Iowa.

4. We believe petitioner's proposal warrants consideration. Channel 223C2 at Ankeny could be reallotted to West Des Moines, Iowa, since it would not deprive Ankeny of its only local aural transmission service,[6] its use at West Des Moines is mutually exclusive with its present use at Ankeny, and it may provide the community of West Des Moines with its second local aural transmission service. A staff engineering analysis has determined that Channel 223C2 can be allotted to West Des Moines, Iowa, in compliance with the Commission's minimum distance separa-

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[1] This petition for rule making was originally dismissed by letter because it would result in the removal of Ankeny's sole local transmission service. Although the letter acknowledged that a construction permit had been granted for a new FM station at Ankeny in an *Initial Decision* in MM Docket No. 88-522, the letter stated that until a permittee was operating on Channel 292A, the channel would not be considered an existing service for purposes of a change in community. Petitioner filed a petition for reconsideration of this action.

Since a station is now licensed and operating on Channel 292A at Ankeny, consideration of this rulemaking petition at this time would not result in removal of Ankeny's sole local transmission service. Accordingly, we will dismiss the petition for reconsideration as moot in light of our action issuing the instant NPRM.

[2] Petitioner notes that while there is no AM or FM channel licensed to or applied for in West Des Moines, a Class D, noncommercial, educational FM broadcast station KWDM, Channel 205D, is currently licensed to serve West Des Moines. Our records indicate that the station has been upgraded to a Class A station.

[3] The coordinates for this allotment are North Latitude 41-39-53 and West Longitude 93-45-24.

[4] The allotment priorities are: (1)First full-time aural service; (2) Second full-time aural service; (3)First local service; and (4)(Other public interest matters. [Co-equal weight given on priorities (2) and (3)].

[5] Since there will be no change in petitioner's transmitter site no study reflecting gain or loss in service will be required.

[6] Channel 292A, Ankeny, has been licensed to V.O.B., Inc. KMXD(FM), BMLH-920430KI.

tion requirements at its presently licensed transmitter site. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 223C2 at West Des Moines.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules for the communities listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Ankeny, Iowa | 223C2, 292A | 292A |
| West Des Moines | | 223C2 |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interest parties may file comments on or before **September 5, 1995**, and reply comments on or before **September 20, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant as follows:

John Griffith Johnson, Jr.

Bryan, Cave, McPheeters & McRoberts

700 Thirteenth Street, N.W., Suite 700

Washington, D.C. 20005-3960

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 776-1660. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Inland Valley Cablevision — CUID No. CA0376 (Hemet, CA)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 5, 1995; Released: July 14, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator on October 21, 1993 and received by the Commission on October 22, 1993. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on June 26, 1995. On November 22, 1993, Operator filed a Motion to Dismiss the complaint for a number of reasons. First, Operator asserts that the complainant failed to complete question number 12 on FCC Form 329. We note that although the complainant failed to certify that he was sending a copy of the complaint to Operator, he did indicate the date on which he mailed the complaint to Operator. Operator admits that it timely received the complaint. Hence, Operator's assertions do not perusade us that the complaint is invalid or should be dismissed. Operator also asserts that the complainant did not include a copy of his most recent bill with the complaint which he sent to Operator and that the complainant incorrectly answered question number 9 on FCC Form 329 as it then existed because he listed in his complaint channels that were sold on the basic service tier as well as channels that were offered on the CPS tier. In addition, Operator urges the Commission to find the complaint deficient on the ground that the complainant incorrectly answered question number 8. Operator argues that the challenged rate as listed by the complainant includes basic rates and therefore does not indicate what rate the complainant finds unreasonable. Operator's assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainant's response to question number 9 includes channels contained on the CPS tier and because the rates listed in answer number 8 indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate and that he

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

believed that rate was unreasonable.[11] Furthermore, there is no evidence that Operator was hindered in responding to the complaint by complainant's failure to include a copy of his most recent bill. We therefore find the complaint valid and deny Operator's Motion to Dismiss.[12] Operator also disputes the validity of a subsequent complaint filed by another cable subscriber. Because we have accepted the complaint at issue as properly filed, we find it unnecessary to rule on Operator's objections to this later filed complaint.

5. Operator asserts that its monthly CPS tier price of $10.80 (plus franchise fee) is justified by its benchmark filing because its price is lower than the maximum permitted charge of $10.86 per month (plus franchise fee), as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. On Line 302 of Worksheet 3, Part II, Operator incorrectly entered the amount it reported on Line 106 of Worksheet 1 instead of the amount it reported on Line 206 of Worksheet 2. The instructions for Line 302 of Form 393 state: "If you completed Worksheet 1 only, enter the number from Line 106, Column E. If you completed Worksheet 2, enter the number from Line 206, Column E." In this case, Operator completed Worksheet 2 and therefore should have entered the number from Line 206. We therefore adjusted Line 302 to equal the amount reported on Line 206 in accordance with the Form's instructions.

b. Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of November 1993. However, Operator's use of November 1993 as the date through which it calculated the inflation adjustment is impermissible. The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of *whole* months from September 30, 1992 to the date you will submit this form." (Emphasis added.) In general, a cable operator must submit a justification of its rates no more than 30 days after service of the earliest valid complaint.[13] Operator was served with the rate complaint on October 21, 1993. Since Operator was required to file a rate justification no later than November 20, 1993, Operator should have used October 1993 as the base date for calculating the Inflation Adjustment Factor. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the correct base date.[14] On July 29, 1994, the U.S Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Operator should have used in justifying its rate.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $10.50 per month (plus franchise fee) for the period from October 22, 1993 to May 14, 1994.[15]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from October 22, 1993[16] to May 14, 1994 which exceeded the maximum price of $10.50 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $10.50 (plus franchise fee).[17]

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[11] We note that in January 1994 the Commission released a revised Form 329 that omitted question 9.

[12] In its Motion to Dismiss, Operator also claims that its cable programming service rate is not subject to regulation by the Commission because its cable system is subject to effective competition under Section 76.905 of the Commission's Rules. However, in letters filed with the Commission on April 20, 1995 and June 26, 1995, Operator confirmed that its cable system serving Hemet is not subject to effective competition.

[13] *See* 47 C.F.R. § 76.956(a).

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[15] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[17] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | CUID Nos. HI0033 (Hana) |
| | HI0034 (Hihei/Wailea) |
| Chronicle Cablevision | HI0035 (Wailuki/Hahului) |
| | HI0037 (Makawao/Pukalani) |
| Benchmark Filing to Support | HI0087 (Paia) |
| Cable Programming Service Price | HI0089 (Maalaea) |
| | HI0100 (Kula) |

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 6, 1995; Released: July 14, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. For each of the franchise areas which are the subject of this Order, the first valid CPS complaint was completed and served on Operator on February 25, 1994 and received by the Commission on February 28, 1994. Operator filed FCC Form 393 in response; Operator also filed an amended Form 393 filing on May 31, 1994 and supplemental filings on June 24, 1994 and February 7, 1995.[11]

5. Operator asserts that its monthly CPS tier price is justified by its benchmark filing because its price is equal to or lower than the maximum permitted charge as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. On Form 393, Part II, Worksheet 1, Line 101, Operator entered $15.25 for the basic service tier and $6.17 for the CPS tier as its current monthly rates as of the initial date of regulation. However, Operator's rate card indicates that its actual monthly rates, exclusive of franchise fees, were $8.58 for the basic service tier and $12.87 for the CPS tier. These figures are consistent with Operator's entries on Form 393, Part I and the supplemental filing of February 7, 1995. The instructions to Form 393 require the oper-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed supplemental information in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted further information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

ator to enter on Line 101 its actual current monthly charges. We therefore corrected Line 101 to match the figures on Operator's rate card.

b. Operator's Form 393, Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Instead of entering its current monthly equipment revenue, as required by the Form 393 instructions, Operator entered a figure based on its prior equipment rates. This observation is confirmed by the fact that Operator's Worksheet 2, Line 204 entry is the same as its Worksheet 1, Line 104 entry. As a result, Operator's Line 104 entry must be revised to reflect its current monthly equipment revenue. Since Operator restructured its rates, including its equipment rates, on September 1, 1993 in an attempt to comply with the Commission's regulations, the monthly equipment cost figure it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 revenue entry.[12] Accordingly, we corrected Operator's Line 104 entry to equal Line 34.

c. Operator entered on Line 121 of Worksheet 1, Part II, a benchmark channel rate of 0.689. Operator entered on Line 220 of Worksheet 2, Part II, a benchmark channel rate of 0.777. Based upon the total number of regulated and satellite channels provided in Operator's supplemental filing of February 7, 1995, and using the benchmark tables (interpolation method), we calculated benchmark channel rates of 0.693 and 0.768 for Lines 121 and 220, respectively.

d. On Line 302 of Worksheet 3, Part II, Operator incorrectly entered the amount it reported on Line 106 of Worksheet 1 instead of the amount it reported on Line 206 of Worksheet 2. The instructions for Line 302 of Form 393 state: "If you completed Worksheet 1 only, enter the number from Line 106, Column E. If you completed Worksheet 2, enter the number from Line 206, Column E." In this case, Operator completed Worksheet 2 and therefore should have entered the number from Line 206. We therefore adjusted Line 302 to equal the amount reported on Line 206 in accordance with the Form's instructions.

e. In its supplemental filing of February 7, 1995, Operator provided two revised Inflation Adjustment Factors: 1.043 based upon its calculations (which were not provided) and 1.039 based upon the information provided in the *Public Notice*. We affirm 1.039 as the Inflation Adjustment Factor through February 1994, the base date Operator should have used in justifying its rates.[13]

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $12.81 per month (plus franchise fee) for the period from February 28, 1994 to May 14, 1994.[14] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the franchise areas referenced in the caption ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the franchise areas referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $12.81 (plus franchise fee).[15]

9. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

10. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in the franchise areas addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[12] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[13] *See* FCC Form 393, page 11, instructions for line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form."); 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI of Pennsylvania, Inc. CUID No. PA0932 (Millcreek)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 6, 1995; Released: July 14, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint for the franchise area which is the subject of this Order was completed and served on Operator on September 11, 1993 and received by the Commission on September 29, 1993. Operator filed FCC Form 393 in response.

5. Operator's monthly CPS tier price of $11.60 (plus franchise fee) is not justified by its benchmark filing because its price is greater than the maximum permitted charge of $11.27 per month (plus franchise fee), as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in its Form 393:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[11] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[12] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[13] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which such Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in the price for the period after May 14, 1994 may be required to reflect the fact that the price during the earlier period, which is used as the starting point to calculate the price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] 47 U.S.C. § 543(b)(3).

[12] 47 C.F.R. § 76.923(b).

[13] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

b. Operator, however, has not properly completed Part III of its FCC Form 393 and thus has not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operator has not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B it has not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operator's Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs The allocations that Operator makes in its schedule B Analyses, however, indicates that its own employees performed customer equipment installation and maintenance.

c. Not only are Operator's Schedule B allocations inconsistent with not having any maintenance facility costs, its allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operator has included on Schedule B and its Schedule B Analysis entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operator has not fully unbundled its equipment costs from its regulated service costs. In its Part III, Step C, Line 9 explanation, Operator sets forth the number of hours that it devoted to maintenance and service of remotes and converters.[14] If Operator's contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in this community is $18.78. Moreover, this calculation overstates Operator's reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[15] Not only is Operator's reported labor cost for the service and maintenance of remotes and converters substantially below this figure, it is also well below its own hourly service charge as calculated on Line 5, Step A, Part III of its Form 393.[16] Thus, Operator's contract labor cost added to its Converter Maintenance cost cannot represent all of Operator's converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operator has not included on Form 393, Part III.[17]

d. Operator has not justified its Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[18] Simply put, Operator cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operator has not justified its Part III allocations and has not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operator's Part II, Worksheet 3, Line 303 entry for this community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[19] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, Operator must have incurred more installation and customer equipment costs than it reported, and we have therefore revised its entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[20] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. On Part II, Worksheet 1, Line 101 of Form 393, Operator entered $9.43 for the basic tier and $11.60 for the CPS tier as its monthly prices for rate-regulated service as of September 1, 1993. On Line 108, Operator entered $18.814.27 as its monthly franchise fee expense. Operator's September 1993 rate card indicates, however, that the prices entered on Line 101 do not include franchise fees. Accordingly, we changed Line 108 to $0.00.

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[14] *See also* Operator's FCC Form 393 at Part III, Line 9 and Line 16.

[15] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19-20 (Cab. Serv. Bur., released Feb. 7, 1995).

[16] Operator's calculated hourly service charge is $19.98.

[17] If, as in other communities, Operator is charging a wire maintenance fee we would expect to see these costs reflected in Operator's rate justification filing. The absence of these costs would provide additional evidence that Operator has not fully unbundled its equipment costs from its programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operator's permitted rate that may be caused by this error.

[18] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[19] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

[20] This adjustment to Worksheet 1 has the effect of causing Operator to calculate its permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. Since Operator did not file a Worksheet 2 and one is needed, we have computed Worksheet 2 by using data supplied by Operator on its Form 1200 filing.

f. On its Form 393 filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of December 1993. However, Operator cannot permissibly calculate inflation through the end of December 1993. Based on the service date of the earliest valid complaint for the franchise area at issue, Operator was required to file a rate justification no later than November 15, 1993. If Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[21] Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator should have filed Form 393.[22] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator should have used in justifying its rate for the franchise area at issue, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $10.85 per month (plus franchise fee) for the period from September 29, 1993 to May 14, 1994.[23]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from September 29, 1993[24] to May 14, 1994 which exceeded the maximum price of $10.85 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $10.85 (plus franchise fee).[25]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[21] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[22] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[23] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[24] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[25] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Petition for Relief of
ADVANTAGE VIDEO & MARKETING, INC.,
Petitioner,

vs. CSR 4287-L

COMCAST CABLEVISION
OF LOWER MERION, INC.,
Respondent,

For Leased Access Channels

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 7, 1995; Released: July 14, 1995**

By the Chief, Cable Services Bureau:

## I. THE PLEADINGS

1. On July 22, 1994, Advantage Video & Marketing, Inc. (herein "Advantage") filed with the Federal Communications Commission a petition for relief alleging that Comcast Cablevision of Lower Merion, Inc. (herein "Comcast") has refused to make commercial channel capacity available in accordance with Sections 76.970 and 76.971 of the Commission's rules. The petition asserts that Comcast has refused a request of Advantage to provide it with leased access time at an hourly rate derived from a proration of Comcast's maximum monthly leased access rate, for programming that would be shown for two hours per day, seven days a week, for a thirteen week period. It requests the Commission to compel Comcast "to make leased access capacity available at the maximum implicit rate as stated in the implementing regulations of Title VI of the Communications Act."[1]

2. Comcast, on March 6, 1995, filed a response to the petition.[2] Comcast concedes that Advantage had correctly calculated the monthly leased access rate. It concedes also that it had refused to provide service at the requested hourly rate, that it had informed Advantage that the prorated hourly rate was non-compensatory and that it would not lease time on its access channel at those rates. It states further that the parties have entered into a Channel Lease Agreement dated January 10, 1995 providing for Advantage to lease 30-minute segments seven times per week at a rate of $37.71 per half-hour for a term of 26 weeks. Citing a prior Cable Services Bureau decision,[3] Comcast asserts the right to charge part time rates which reasonably reflect the different values that different day parts have in the media industry, provided that the total of part time rates do not exceed its maximum monthly rate permitted under Section 76.970 of the rules. It requests the Commission to confirm that cable operators may establish hourly rates during any day part which deviate from a straight prorate of the monthly rate so long as the sum of such hourly rates does not exceed the maximum monthly rate. Finally, Comcast provides a listing of advertising rates for itself and other media entities in the Philadelphia market for comparison purposes, to support its position that a proration of its maximum monthly rate would not permit a cable operator to obtain a reasonable hourly rate.

3. On April 13, 1995, the Commission received a letter from Advantage in reply to the response of Comcast.[4] Advantage does not deny having entered into a Channel Lease Agreement as stated by Comcast. It asserts, however, that Comcast's $71.50 per hour rate[5] does not meet the requirements of *TV-24 Sarasota* for part time rates, because Comcast is allegedly charging that rate "regardless of the hour of the day or day of the week the program is scheduled." It asserts further that the media rates for the Philadelphia market are inappropriate for making comparisons with the much smaller Lower Merion, Pennsylvania market in which its programming is shown.

## II. BACKGROUND

4. In 1984, Congress amended the Communications Act of 1934 by adding among other things a commercial leased access requirement, pursuant to which cable operators with 36 or more activated channels must set aside part of their channel capacity for use by programmers that are not affiliated with them.[6] The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable

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[1] Petition, p. 2.

[2] The petition shows that it was served on Comcast. It was placed on public notice in "Public Notice - Cable Television Service Registration; Special Relief and Show Cause Petitions," No. 988, dated August 4, 1994. Nonetheless, Comcast did not respond to the petition until after its failure to do so had been called to its attention by Commission staff in a letter dated February 3, 1995. We remind cable operators that Section 76.975(e) of the rules provides for the filing of a response within 30 days of the filing of a petition for relief. If a response is not filed, a decision may be made on the existing record.

[3] *In the Matter of Petition for Relief of TV-24 Sarasota, Inc. vs. Comcast Cablevision of West Florida, Inc.*, (Cable Serv. Bur. DA 94-1595), released December 27, 1994 in File No. CSR 4178-L (herein "TV-24 Sarasota").

[4] Section 76.975 of the rules provide for the filing of a Petition for Relief, and for the filing of a Response within 30 days of the filing of the Petition. No provision is made for the filing of a reply to the Response. *See* 47 C.F.R. § 76.975. In view of the events shown to have occurred since the filing of the petition and the failure of Comcast to file a response until being reminded to do so (*See* n.1 above), we believe the issues before us are best resolved in the public interest by considering the matters shown in the reply.

[5] Absent a copy of the Channel Lease Agreement, we are unable to resolve whether the agreed-upon rate is $71.50 per hour as Advantage states, or $37.71 per half hour as Comcast states. The $3.92 per hour difference is not material to this decision, however.

[6] *See* Section 612 of the Communications Act of 1934, as amended., 47 U.S.C. § 532. The amount of channel capacity an operator must set aside is based on a system's activated channel capacity. *See* 47 U.S.C. § 532(b).

Act") revisited the leased access requirement and directed the Commission to establish, among other things, rules for determining maximum reasonable rates for commercial leased access.[7] Pursuant to that Congressional directive, the Commission established regulations, including rate regulations, applicable to leased access channels, in its proceedings in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, MM Docket 92-266, (the *Rate Order*), 8 FCC Rcd 5631 (1993), at ¶ ¶ 531-538. The new leased access regulations relevant to this case are found at 47 C.F.R. §§ 76.970, 76.971 and 76.975.

5. In the *Rate Order*, the Commission developed procedures that cable operators must follow to determine the maximum reasonable rate that a cable operator may charge any non-affiliated programmer for leased access.[8] Sections 76.970(b), (c) and (d) of the rules[9] describe the methodology to be used by cable operators for calculating a maximum reasonable rate for leased access channels.[10] This methodology uses (a) the rates subscribers pay per channel for the services they receive and (b) the rates cable operators pay nonaffiliated programmers for programming (other than leased access programming) provided to subscribers. The difference between these two amounts is deemed to be the implicit fee that nonaffiliated programmers pay to be carried on the cable system.[11] The highest implicit net fee thus determined becomes the maximum monthly rate that the operator may charge a programmer for leased access.[12]

6. In our *TV-24 Sarasota* decision we recognized that the statutory provisions relating to leased access do not specifically address the question of rates for part-time use. We acknowledged that prorating the maximum monthly rate was stated in our rules as a method which can be used for establishing maximum rates for shorter periods.[13] We observed that the only rate that cable operators are not permitted to exceed under our rules is the maximum reasonable rate as calculated on a monthly basis from the highest implicit net fee.[14] We declined to construe our rules to require an operator to adhere to a rigid formula for determining its hourly leased access rate by prorating its maximum rate for a full-time channel into equal hourly amounts. A rational time of day rate structure that is appropriately related to time of day pricing in the media industry within the overall "highest net implicit fee" formula and that does not frustrate leased access channel use, we concluded, would not conflict with the rules.[15]

7. We accepted the fact that the media industry places different values on the different hours of the day in recognition of the different values that different hours of the day have in the market place. Accordingly, we concluded that cable operators should be allowed to charge different time-of-day rates so long as the differences have a reasonable basis. Such an approach would better recognize the different values that different time slots have in the marketplace in which both cable operators and cable programmers, as well as other media users such as advertisers, operate, as well as furthering the statutory goal of promoting diverse programming, because programmers that could not afford rates based on uniform pro rata pricing may be better able to afford the resulting lower "non prime-time" rates. Moreover, we believed that allowing "prime-time" pricing should help promote fuller utilization of designated leased access channels by making "non prime-time" slots more attractive.[16]

## III. DISCUSSION

8. The principal issue presented is whether Comcast has failed to make a leased access channel available to Advantage as required by Section 76.970 of the Commission's rules, as alleged. The record shows that, subsequent to the filing of the petition, Comcast and Advantage have in fact entered into a Channel Lease Agreement dated January 10, 1995, for a term of 26 weeks. Advantage in its reply has not denied the existence of that agreement. It also does not deny that it is being provided with channel capacity for the 30 minute segments seven times per week apparently called for in that agreement.[17] On the basis of this record now before us, we conclude that Comcast has not failed to make leased access capacity available to Advantage.

9. While a substantial delay occurred between the dates of the initial requests by Advantage for leased access capacity[18] and the date of the Channel Lease Agreement, the entire record does not support a finding that leased access capacity was refused. The petition shows that Advantage made a request for a certain amount of channel capacity at an hourly rate of $11.20 per hour. The requested rate had

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[7] *See* Pub. L. No. 102-385, §§ 9, 10(a) and 10(b), 106 Stat. 1460, Oct. 5, 1992. *See* 47 U.S.C. § 532(c)(4)(A) & (B) (1992).

[8] 47 C.F.R §§ 76.970(b), (c) and (d).

[9] Sections 76. 970 (b), (c), and (d) read as follows:

"(b) The maximum commercial leased access rate that a cable operator may charge is the highest implicit fee charged any nonaffiliated programmer (excluding leased access programmers) within the same program category.

"(c) The implicit fee charged an unaffiliated programmer shall be calculated by determining the monthly price per subscriber that the operator pays to carry the programming of nonaffiliated providers and deducting the monthly price subscribers pay to view the programming of the nonaffiliated providers. This difference is multiplied by the percentage of subscribers able to receive the nonaffiliated provider's programming. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services)."

"(d) For each of the three program categories as defined in Para. (f) of this section, the highest implicit net fee charged any nonaffiliated provider in each category shall be the maximum monthly leased access rate per subscriber that the operator could charge a commercial leased access programmer in that category. The highest implicit net fee shall be based on contracts in effect in the previous calendar year. Maximum rates for shorter periods can be calculated by prorating the monthly maximum rate." *See* 47 C.F.R. § 76.970(b)(c)&(d).

[10] *See* Rates Order, at ¶ ¶ 512 through 522.

[11] *See* Rates Order, ¶ ¶ 516, 517 and 518. Example calculations are set forth in the Rates Order, at ¶ 518, n.1312.

[12] 47 C.F.R. § 76.970(d).

[13] *See*, Section 76.970(d).

[14] *See*, Section 76.970(c).

[15] *See* TV-24 Sarasota, at ¶ 26.

[16] *See* TV-24 Sarasota, at ¶ 27.

[17] *See* Response, p. 2.

[18] The petition shows efforts by Advantage to obtain a leased access channel extending from May 25, 1994 through July 18, 1994, without success prior to the filing of the petition.

been developed, the petition shows, by prorating Comcast's monthly rate to obtain an hourly rate.[19] Further, as the petition shows, Comcast had informed Advantage that it would not agree to provide leased access capacity at the requested rate. The petition was filed with matters in this posture. The record does not indicate what, if any, additional steps were taken to further negotiate a rate acceptable to both parties. However, the response shows that the Channel Lease Agreement was entered into on January 10, 1995. On these facts, we cannot find that Comcast refused to provide service as the petition asserts. Moreover, as we stated in the *TV-24 Sarasota* decision, Comcast was not required by our leased access rules to provide hourly service at requested hourly rates which had been derived from a straight prorate of its monthly leased access rate. For these reason, we find that Comcast's refusal to provide part time service to Advantage at the requested $11.20 per hour rate does not constitute a failure to provide leased access capacity in accordance with Section 76.970 of the rules, as alleged.

10. In its reply, Advantage raises a new complaint that the hourly rate in the Channel Lease Agreement does not meet the requirements of our *TV-24 Sarasota* decision, because Comcast isallegedly charging $71.50 per hour "regardless of hour of the day - or day of the week the program is scheduled." Advantage provides no clear and convincing evidence in support of this new allegation.[20] Comcast states that the Channel Lease Agreement provides for carriage of 30 minute segments seven times per week for 26 weeks, or one 30 segment per day. The reply does not show the day part in which this daily 30 minute segment is in fact carried or that the $71.50 rate is an inappropriate rate for the day part in which it is carried.

11. Advantage asserts further that the media rates for the Philadelphia market, which Comcast provided with its response, are not useful for comparison purposes with the much smaller Lower Merion, Pennsylvania market in which its programming is shown. As we pointed out in the *TV-24 Sarasota* decision, a rational time of day rate structure that is appropriately related to time of day pricing in the media industry and that does not frustrate leased access channel use would not conflict with our rules. The media rate information provided by Comcast tends to confirm that time of day pricing is the norm in the Philadelphia area, which includes Lower Merion.[21] However, Comcast has not provided a complete schedule of hourly rates for the record for our review, and the record does not show that Comcast has provided a complete schedule of hourly rates to Advantage. Accordingly, we will require Comcast to establish a schedule of rates, or rate card, for different times of day pursuant to which, if all times were used, the sum of the part time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 of our rules.[22] Such rate structure shall be reasonably reflective of empirical time of day values and should not serve merely as a mechanism to retard use. We will also require Comcast to provide Advantage with a copy of such complete schedule of part time rates, in order that Advantage may be able to select the rates and day parts most suitable to its programming needs. Although we have concluded that Comcast has not failed to make leased access capacity available to Advantage as alleged, we remind Comcast that cable operators have an obligation under Section 76.970(e) of our rules to provide "[u]pon request, a schedule of commercial leased access rates . . . to prospective leased access programmers."[23]

12. We will also require Comcast to maintain on file adequate records, consistent with Section 76.970(e) of our rules, that show the total monthly revenues derived from part time users of each leased access channel, together with the maximum monthly charge for a full leased access channel and the documentation and calculations used for deriving the maximum monthly charge in accordance with Section 76.970 of the rules.

## IV. ORDERING CLAUSES

13. For the foregoing reasons, IT IS ORDERED that the petition of Advantage Video & Marketing, Inc. (herein "Advantage") IS GRANTED in part as described above and in all other respects IS DENIED.

14. IT IS FURTHER ORDERED that the Comcast Cablevision of Lower Merion, Inc. (herein "Comcast") shall, within thirty days of the release date of this order, (a) establish a reasonable schedule of rates, or rate card for different times of day pursuant to which, if all times were used, the sum of the part time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 or our rules, and (b) provide a copy of such schedule of rates to Advantage.

15. IT IS FURTHER ORDERED that Comcast shall maintain on file adequate records, consistent with Section 76.970(e) of our rules, which show the total monthly revenues derived from part time users of each leased access channel, together with the maximum monthly charge for a full leased access channel and the documentation and calculations used for deriving the maximum monthly charge in accordance with Section 76.970 of the rules.

16. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

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[19] Advantage applied the methodology from Section 76.970 of the Commission's rules to the number of channels in, and the price for, Comcast's Basic Service tier and its number of subscribers, to develop an estimated Comcast maximum monthly rate of $8062 per channel. Advantage then prorated the estimated monthly rate to obtain the $11.20 per hour rate, which it demanded that Comcast apply to its proposed service. *See* Attachment to Petition, p. 3.

[20] Section 76.975(g) of the rules provide that, "To be afforded relief, the petitioner must show by clear and convincing evidence that the cable operator has violated the Commission's leased access provisions ...." *See* 47 C.F.R. § 76.975(g).

[21] Lower Merion is encompassed by the Grade A signals of major television stations serving the Philadelphia market. *See* Television Factbook, 1992 Edition, at p. A-975 to A-980.

[22] *See* 47 C.F.R. § 76.970(d).

[23] *See* 47 C.F.R. §76.970(e).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: July 14, 1995**

## CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

Several local exchange carriers filed revisions to their Cost Allocation Manuals (CAMs) for the separation of regulated and nonregulated costs for the quarter ended June 30, 1995. Some of the carriers propose revisions to reflect their video dialtone service offerings. These revisions are filed pursuant to Responsible Accounting Officer Letter 25 ("RAO 25") which provides accounting, recordkeeping and cost allocation guidance to local exchange carriers that provide video dialtone service (DA 95-703, released April 3, 1995). Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

| | |
|---|---|
| Ameritech Operating Companies | AAD 95-99 |
| Bell Atlantic | AAD 95-100 |
| BellSouth Corporation | AAD 95-101 |
| Cincinnati Bell Telephone Company | AAD 95-102 |
| GTE | AAD 95-104 |
| Lincoln Telephone | AAD 95-105 |
| Nevada Bell | AAD 95-106 |
| NYNEX Telephone Companies | AAD 95-107 |
| Pacific Bell | AAD 95-108 |
| Puerto Rico Telephone Company | AAD 95-109 |
| Rochester Telephone | AAD 95-110 |
| Southern New England Telephone | AAD 95-111 |
| Southwestern Bell | AAD 95-112 |
| United & Central | AAD 95-113 |
| U S West, Inc. | AAD 95-114 |

The following companies filed letters stating there were no changes to their CAMs for the quarter ended June 30, 1995.

| | |
|---|---|
| Alltel Telephone Company | AAD 95-97 |
| American Telephone & Telegraph Company | AAD 95-98 |
| Citizens Utilities Company | AAD 95-103 |
| National Exchange Carrier Association | AAD 95-115 |

Parties may file comments on the proposed revisions to the CAMs no later than **August 14, 1995**. Replies should be filed by **August 29, 1995**. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M Street, N.W. Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

COMCAST CABLEVISION OF TALLAHASSEE, INC.

Appeal of Local
Rate Order of City of
Tallahassee, FL

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 10, 1995; Released: July 17, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On August 12, 1994, Comcast Cablevision of Tallahassee, Inc. ("Comcast") filed with the Commission an Appeal From A Rate Reconsideration Order of the City of Tallahassee ("Appeal"). The local rate reconsideration order ("Reconsideration Order") was adopted by the City of Tallahassee, Florida ("the City") on July 13, 1994.[1] On September 2, 1994, the City filed an Opposition to Appeal by Comcast Cablevision of Tallahassee, Inc. ("Opposition"), and on September 20, 1994, Comcast filed a Reply to the Opposition of the City of Tallahassee ("Reply").[2]

2. The City's Reconsideration Order is related to an earlier order the City had issued on March 9, 1994 ("Initial Order") regarding Comcast's basic cable rates.[3] On April 8, 1994, Comcast had filed with the Commission an appeal of the Initial Order. Subsequent to filing that appeal, the City and Comcast entered into an agreement pursuant to which the City agreed to reconsider its Initial Order. Based on their agreement, Comcast requested that the Commission dismiss Comcast's April 8, 1994 appeal, which we did on August 29, 1994.[4]

3. During the City's reconsideration proceeding, the City addressed Comcast's objections to certain of the Initial Order's conclusions and holdings. During the reconsideration process, Comcast submitted and the City considered substantial additional information. At the conclusion of the reconsideration process, the City issued the Reconsideration Order in which the City affirmed some parts and modified other parts of the Initial Order that were subject to reconsideration. The totality of the City's final action with respect to Comcast's rates is thus determined by reference to both the Initial Order and the Reconsideration Order.

4. The City's rate orders establish a new rate schedule for Comcast's basic service tier and direct Comcast to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.[5]

5. Comcast makes the following arguments on appeal: (1) the City improperly used the benchmark formula, rather than the benchmark table, to compute the applicable benchmark rate; (2) the City used incorrect data in analyzing Comcast's Form 393 worksheets; (3) the City improperly extended to bulk rate subscribers the lowest bulk rate that Comcast offers; (4) the City prescribed anunreasonably low charge for installation of additional outlets; (5) the City unreasonably disallowed Comcast's treatment of subscriber drops; (6) the City improperly adjusted the depreciation schedules for converters and remote control units; (7) the City improperly computed Comcast's installation hours in the calculation of the hourly service charge ("HSC"); (8) the City improperly computed dispatcher hours in the calculation of the HSC; (9) the City improperly disallowed Comcast's "Cableguard" charge for maintenance of customer-owned home wiring; and (10) the City improperly treated Comcast's "Value Pak" a la carte offerings as a regulated service. The City rebutted Comcast's arguments in its Opposition to Comcast's appeal. We consider each of these issues in turn.

## II. STANDARD OF REVIEW

6. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[6] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[7] Therefore, the Commission

[1] The City issued a separate written order entitled "Order on Reconsideration." The City adopted that order in Resolution No. 94-R-0031, dated July 13, 1994.

[2] Comcast also filed on August 2, 1994, a Request for Expedited Consideration for Stay of a Rate Reconsideration Order of the City of Tallahassee Pending Appeal. This request for a stay of the Reconsideration Order was granted on September 30, 1994, pending the earlier of a date ten days after our resolution of the instant appeal or of our Letter of Inquiry ("LOI") proceeding (LOI-93-2) regarding the regulatory status of Comcast's a la carte package. Comcast Cablevision of Tallahassee, Inc., DA 94-1071 (Cab. Serv. Bur., released September 30, 1994). We note that we issued a decision resolving Comcast's a la carte LOI on November 18, 1994. *See* Comcast Cablevision of Tallahassee Letter of Inquiry on A La Carte Issue, DA 94-1275 (Cab. Serv. Bur. released November 18, 1994).

[3] The Initial Order consisted of the City's Resolution No. 94-R-0011, dated March 9, 1994.

[4] Comcast Cablevision of Tallahassee, Inc., DA 94-949 (Cab. Serv. Bur., released August 29, 1994).

[5] City Resolution No. 94-R-0031, at 1-2 (issued July 13, 1994). Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[6] 47 C.F.R. § 76.944.

[7] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); *see* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4341 (1994) (*"Third Reconsideration Order"*).

will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[8] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[9]

## III. DISCUSSION

7. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[10] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

8. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[11] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393.

### A. BENCHMARK CALCULATION

#### 1. Positions of the Parties

9. In completing its Form 393, Comcast determined its benchmark rate using the Commission's benchmark table. In analyzing Comcast's filing, the City's consultant, R.W. Beck and Associates ("Beck"), calculated the benchmark rate using the Commission's benchmark formula instead of the table.[12] The City's use of the benchmark formula resulted in a lower maximum permitted rate than that which would result from using the benchmark table. In its Appeal, Comcast claims that it was improper for the City to substitute use of the benchmark formula for Comcast's use of the benchmark table. Comcast maintains that our rules permit the operator to elect to use either the benchmark tables or the benchmark formula, and that the City does not have the discretion to disregard the operator's selection.[13] Comcast cites as support for its position the fact that the Commission's official FCC Form 393 computer spreadsheet automatically uses the higher of the benchmark table rate and the benchmark formula rate.[14]

10. The City claims that the Commission's rules do not bind the City to the operator's choice of benchmark rate calculation method in the situation where the City is required to recalculate the Form 393 to correct other errors in the operator's filing.[15] The City argues that the requirement that the City prescribe a "reasonable rate" authorizes the City to use whatever method it chooses to use.[16]

#### 2. Discussion

11. A cable operator's benchmark per channel rate represents the rate that a comparable cable system that is subject to competition would charge. An operator derives its benchmark per channel rate by using either the benchmark tables in Attachment A to FCC Form 393, or the benchmark formula on page 33 of that form. The benchmark tables set forth various benchmark per channel rates, based upon the number of regulated channels and satellite-delivered signals for an operator's community unit, as well as the number of subscribers on an operator's system. If the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables, then the operator may interpolate the appropriate benchmark per channel rate from the data in the benchmark tables. Alternatively, an operator may calculate its benchmark per channel rate by inserting its benchmark data (i.e., the number of regulated channels and satellite-delivered signals

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[8] *Id.*

[9] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[10] To the extent that an operator has sought to take advantage of the refund deferral period available under our *Second Reconsideration Order*, the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4183-4185 (1994) (*"Second Reconsideration Order"*).

[11] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[12] Addendum to the March 3, 1994 Report to Franchising Authority ("Beck Addendum") at 3.

[13] Appeal at 9-10.

[14] *Id.* at 10.

[15] Opposition at 11.

[16] *Id.* at 11-12. The City analogizes to the Commission's approach with respect to inflation rates which permits, under certain circumstances, recalculation using updated data.

for the operator's community unit, and the number of subscribers on an operator's system) into the Commission's benchmark formula.[17]

12. The instructions for completing Line 121 of FCC Form 393, which are found on page 11 of FCC Form 393, explain how an operator may interpolate its correct benchmark per channel rate if the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables. These instructions go on to state, "[a]lternatively, you may apply the FCC's benchmark formula to calculate your benchmark rate." Furthermore, the "Instructions for Identifying the Appropriate Benchmark Rate from the Tables in Attachment A" on page 22 of FCC Form 393, state, "[i]f either the total number of channels on the regulated tiers or the total number of satellite channels on those regulated tiers for your community unit does not equal the channels displayed in the selected table, you may determine your benchmark rate per channel by using the Commission's formula, or you can perform one of the following [interpolation] calculations." We find that it is clear from these two separate sets of instructions that cable operators may determine their benchmark per channel rate by employing either the Commission's benchmark formula or by interpolating the correct benchmark rate from the benchmark tables in Attachment A to FCC Form 393.[18] Comcast followed the instructions on the Commission's Form 393 when it chose to interpolate its benchmark per channel rate from the benchmark tables. The City's use of the Commission's benchmark formula to calculate its benchmark rate is contrary to the Commission's instructions on FCC Form 393, which provide the operator, not the regulator, the choice of calculating its benchmark rate by using either the benchmark formula or the benchmark tables. Accordingly, we find that the City's decision to substitute its calculation of Comcast's benchmark rate using the Commission's formula for Comcast's calculation of its benchmark rate, which Comcast derived by interpolation from the benchmark tables, was unreasonable. Therefore, we remand this issue and instruct the City to recalculate Comcast's maximum permitted rate for the basic service tier in a manner that is consistent with our ruling herein.

### B. DATA USED IN COMPLETING FORM 393

#### 1. Positions of the Parties

13. In completing Worksheet 2 of Form 393, Part II, the City's consultant used estimates instead of actual data for Comcast's equipment revenues.[19] Comcast claims that it had informed the City that the City was using inaccurate data and that Comcast had provided the City's consultant with the correct information.[20] Comcast argues that the use of the erroneous data had the effect of "reducing Comcast's rate further."[21]

14. In its Opposition, the City maintains that its consultant used estimates of equipment revenue data in completing Line 204 of Worksheet 2 because Comcast did not provide the City with actual data for the equipment revenues until just before the City was scheduled to make a final rate determination, and that such time was long after Comcast had been required to provide the equipment revenue information.[22] The City argues that it nevertheless did consider Comcast's equipment revenue data,[23] and that in fact using Comcast's data would not have changed the result of the City's determinations.[24] The City claims that it discussed with Comcast the fact that using Comcast's equipment revenue data would not have an impact and that "Comcast did not dispute this point."[25]

#### 2. Discussion

15. We are unpersuaded by Comcast's arguments regarding the equipment revenue data. The record demonstrates that the City did in fact consider Comcast's late-filed equipment revenue data.[26] We also agree with the City that the use of the estimated data did not have any impact on the ultimate analysis and the rates adopted. As the City explained in its Opposition, regardless of whether Comcast's equipment revenue data or the consultant's estimated data were used in Line 104 of Worksheet 2, the same benchmark rate would have been used in subsequent calculations. Consequently, the use of the estimated data did not have the effect of "reducing Comcast's rate further" as suggested by Comcast in its Appeal. Based on the foregoing, we affirm the City's rate orders on this issue.

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[17] The benchmark formula is as follows: LNP = 2.3509 + 7.3452(RECIPSUB) - 0.8878(LNCHAN) + 0.1006 (LNSAT), where LNP = natural logarithm of the benchmark rate per channel; RECIPSUB = 1/number of households subscribing to the cable system; LNCHAN = natural logarithm of the number of channels in use in all regulated tiers of service; and LNSAT = natural logarithm of the number of satellite-delivered channels in all regulated tiers of service.

[18] *See* Cablevision Systems of Southern Connecticut, Limited Partnership, DA 95-58 (Cab. Serv. Bur., released January 19, 1995); TCI Cablevision of Central Connecticut, DA 95-59 (Cab. Serv. Bur., released January 19, 1995).

[19] Opposition at 14-15.

[20] Appeal at 13.

[21] *Id.*

[22] Opposition at 2, 15.

[23] *Id.*at 2, 14-15.

[24] *Id.* at 2, n.1, 15. The City notes that Worksheet 2 calculates the per-channel rate being charged as of September 30, 1992 and compares that rate to the benchmark. The rate is then reduced either ten percent or to the benchmark, whichever reduction is less. The City explains that using either Comcast's equipment revenue data or the consultant's estimated data, Comcast's per-channel rate would have been above the benchmark, but less than ten percent above the benchmark. Thus, the benchmark rate would have been used in subsequent calculations, using either Comcast's or its consultant's equipment revenue data. *Id.* at 2, n.1.

[25] *Id.* at 2, 15 n.30.

[26] Opposition, Exhibit 16, Excerpt from City Commission Meeting.

### C. ADJUSTMENTS TO BULK ACCOUNT RATES

#### 1. Positions of the Parties

16. In the original rate proceeding that culminated in the City's Initial Order, the City found that Comcast was charging non-uniform rates to its bulk account customers, and thus sought justification from Comcast for its various bulk rates.[27] In the City's Initial Order, the City found that Comcast had failed to show any basis for charging different rates to different bulk customers,[28] and directed Comcast to "reduce its bulk service rates so that no bulk service customer is charged a rate higher than the lowest bulk rate in effect on September 1, 1993."[29] This finding regarding Comcast's bulk rates was one of the issues that was subject to the City's reconsideration.

17. In its Reconsideration Order, the City upheld its earlier findings and orders regarding Comcast's bulk rates.[30] The City argued that under Commission regulations, Comcast carries the burden of proving that there are differences in costs that justify charging different rates.[31] The City found that Comcast had still not provided sufficient evidence to justify the differences in the bulk rates charged to its bulk rate customers, but had continued to indicate that the rates were established based on business judgment rather than cost analysis.[32] The City also rejected Comcast's argument that even if the City were to find that Comcast's bulk rates were not justified, the City could not appropriately require Comcast to charge all bulk rate customers the lowest available bulk rate. The City reasoned that its remedy was consistent with FCC regulations and the Cable Act and that "the FCC regulations recognize that it is more appropriate to require an operator to offer any competitive rate it chooses to offer to all similarly situated customers."[33]

18. On appeal, Comcast argues that the City may not adjust Comcast's bulk account rates. Comcast claims that it provided the City with adequate justification of its bulk rates.[34] Comcast also argues that the remedy for an invalid bulk rate structure is either to discontinue the bulk discount and adjust the bulk rate to the maximum permitted level charged to residential customers, or to modify the bulk discounted rate to comply with the Commission's regulations.[35] Comcast claims that if any bulk rate is to be charged by default, it should be the highest bulk rate, because that rate is within the FCC's permitted level but also recognizes some price reductions for multiple dwelling units ("MDUs").[3h] Comcast maintains that charging the lowest available bulk rate is counter-intuitive and would result in cross-subsidies for the lower rates by collecting higher rates from other subscribers.[37] Comcast further claims that charging the lowest available bulk rate to all MDUs80 irrespective of building size and contract duration would violate the Commission's mandate that rates must be variable based on MDU size and contract duration.[38] Finally, Comcast presents several arguments to justify the specific bulk rates at issue.[39]

19. In its Opposition, the City argues that it reasonably concluded that Comcast failed to justify its bulk rates. The City maintains that the operator has the burden of justifying its bulk rates. The City argues that the Commission's regulations allow operators to charge different rates to MDUs of different sizes and to set rates based on the duration of a contract "provided that the operator can demonstrate that its cost savings vary with the size of the building and the duration of the contract, and as long as the same rate is offered to buildings of the same size."[40] The City recounts the numerous opportunities it gave Comcast to provide sufficient information to justify the distinctions in Comcast's bulk rates, and the City describes what it considered to be Comcast's inadequate responses.[41] The City notes that in the initial proceeding, Comcast did not provide any justification for its distinctions in the rates it charged to various MDUs.[42] The City claims that in the reconsideration proceeding, Comcast only filed a rate schedule that showed the particular rates that were charged to each MDU category, but justified the rate differences on the basis of "business judgment."[43] The City thus argues that it acted reasonably in finding Comcast had failed to adequately justify its varying bulk rates.[44] With respect to the appropriate remedy for the bulk rate situation, the City argues in its Opposition that ordering Comcast to charge all MDUs the lowest rate offered to any MDU is consistent with the 1992 Cable Act's objective to require an operator to offer any competitive rate it chooses to offer to all similarly-situated customers.[45] The City argues that requiring Comcast to eliminate the bulk rates would mean prohibiting Comcast from meeting competition, and the FCC rules are clear that a local franchising authority cannot prohibit an operator from charging competitive rates (so long as certain conditions are met).[46] The City maintains that requiring an operator to charge a competitive rate (i.e.,

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[27] Report of R.W. Beck to the City of Tallahassee Franchising Authority Regarding the Form 393 Cable Rate Filing of Comcast Cablevision of Tallahassee, issued March 3, 1994 ("Beck Report") at 15-16.

[28] *Id.*; *see also* Reconsideration Order at 4.

[29] Resolution No. 94-R-0011 at 3, paragraph 4.

[30] *See* Reconsideration Order at 3-7 ; Resolution No. 94-R-0031 at 2, paragraph 3.

[31] Reconsideration Order at 5.

[32] *Id.* The City's consultant, in its revised report, noted that Comcast offers bulk rates to four classes of customers, and that the rates offered to groups within each class differ from the rates offered to groups of the same size (and for contracts of the same duration) in other classes. Beck Addendum at 2.

[33] Reconsideration Order at 6.

[34] Appeal at 13-14.

[35] *Id.* at 14. In its Reply, Comcast also makes the somewhat different statement that the remedy for an invalid bulk rate structure is either to discontinue the bulk rate or to conform the bulk rate to the highest rate in effect. Reply at 9.

[36] Appeal at 14.

[37] *Id.* at 15; Reply at 10, n.26.

[38] Reply at 10.

[39] *See* Appeal at 17-18. Comcast also represents, however, that it has decided to discontinue all but Hotel/Motel/Retirement Hospital bulk rates. *Id.* at 16-17.

[40] Opposition at 16-17.

[41] *Id.* at 16-20.

[42] *Id.* at 16.

[43] *Id.* at 18.

[44] The City also notes that Comcast includes in its Appeal arguments and evidence, in an attempt to justify Comcast's bulk rates, that were not presented in the City's proceedings. *Id.* at 20.

[45] *Id.* at 21.

[46] *Id.*

the lower discounted rate) "is a better approach than requiring the operator to charge a higher benchmark rate, which at best is a proxy for competition."[47]

**2. Discussion**

20. We will not disturb the City's finding that Comcast failed to justify its bulk rates. Franchising authorities have the authority to ensure that an operator's rate structure is in compliance with the uniform rate provisions of the 1992 Cable Act.[48] In rate regulation proceedings, the cable operator, not the local franchising authority, bears the burden of proving the reasonableness of its proposed regulated rates.[49] After providing the cable operator with an opportunity to participate in the rate review process and to submit documentation supporting its proposed rates, the local franchising authority is fully justified in making its findings based on the best information available to it at the time it issues its rate order.[50] Under the Commission's rules, cable operators may offer different bulk rates to MDUs that vary with the size of the MDUs and the duration of the contracts, provided the operator can justify the rate differences based on relative cost savings.[51] Cable operators must, therefore, provide franchising authorities with adequate information to determine if the bulk agreements are in compliance with the Commission's rules.

21. In the present case, the evidence demonstrates that Comcast offered bulk rates that varied across classes of bulk rate customers and within classes. The variations across and within classes were based on building size and contract duration.[52] The record also shows that the City gave Comcast several opportunities during both the initial review process and the reconsideration proceeding to provide information that sufficiently explained and justified Comcast's various bulk rates.[53] Because the City provided Comcast with copies of the consultant's reports and the draft reconsideration order, Comcast was on notice from the City that it needed to support substantively the differences in the bulk rates it offers to various MDUs. In its Appeal, Comcast does little to counter the City's allegation that the information it submitted to the City to justify its bulk rates was incomplete and inadequate. The record indicates that Comcast provided the City with a rate schedule that identified the various types and sizes of its MDUs, the durations of the particular bulk contracts, and the rates offered to each category of MDUs. However, Comcast did not provide the City with data regarding the cost savings that form the basis of the various bulk rates.[54] Significantly, there is no evidence in the record indicating that Comcast, during either the initial review period or the reconsideration period, provided the City with any explanation regarding the underlying cost savings basis for the varying rates indicated in Comcast's rate schedule.[55] As noted above, we will sustain the franchising authority's decision as long as there is a reasonable basis for that decision. We find that the City had reasonable grounds upon which to conclude that Comcast had not adequately justified its bulk rates. In this case, the City was reasonable in finding that Comcast had not made a sufficient showing because, although it provided a schedule containing data that distinguished between bulk contracts based on the sizes and types of the MDUs and the duration of the contracts, it did not provide data showing any cost savings derived by Comcast from its bulk agreements. In the absence of this information, the City was unable to determine whether the bulk contracts were in conformance with the Commission's rules. We find that the City had reasonable grounds upon which to conclude that Comcast had not adequately justified its bulk rates.

22. However, we find that the City's order that Comcast "reduce its bulk service rates so that no bulk service customer is charged a rate higher than the lowest bulk rate in effect on September 1, 1993"[56] is inconsistent with our regulations. As noted earlier, our rules allow cable operators to offer different bulk rates to MDUs of different sizes and to vary bulk rates based on the duration of the contracts, provided the operator can justify the rate differences based on relative cost savings.[57] In a previous case, SBC Media Ventures, Inc. Appeal of Local Rate Order of Montgomery County,[58] we stated that where an operator fails to meet this burden, the local franchising authority may order the rates for one MDU reduced to a lower rate established by the operator for an MDU of the same size under the same conditions -- i.e., a similarly situated MDU.[59] We noted, however, that the local franchising authority may

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[47] *Id.* at 21-22, n.50.

[48] *Rate Order*, 8 FCC Rcd at 5899.

[49] *See* 47 C.F.R. § 76.937.

[50] *See Rate Order*, 8 FCC Rcd at 5723-5724.

[51] 47 C.F.R. § 76.984 states:

> Cable operators may offer different rates to multiple dwelling units of different sizes and may set rates based on the duration of the contract, provided that the operator can demonstrate that its costs savings vary with the size of the building and the duration of the contract, and as long as the same rate is offered to buildings of the same size with contracts of similar duration.

*See also Rate Order*, 8 FCC Rcd at 5896-99; *Third Reconsideration Order*, 9 FCC Rcd at 4325-27.

[52] Beck Addendum, Appendix D. In other words, the rate for a 100-unit condominium with a one-year contract differed from the rate for a 100-unit hotel with a one-year contract; it also differed from the rate for a 100-unit condominium with a two-year contract, and from the rate for a 50-unit condominium with a one-year contract. *Id.*

[53] *See* Appeal at 2 and Opposition at 4-7 discussing the procedural history of the local proceedings.

[54] Beck Addendum, Appendix D. To make an adequate showing of cost savings, an operator is not required to specifically quantify the exact cost savings that it experiences from providing service pursuant to bulk agreements. It should, however, explain to the franchising authority, through a combination of numerical data and narrative description, what cost factors allow it to offer its bulk discounts to particular bulk subscribers more cheaply than to other bulk subscribers.

[55] In its Appeal, Comcast includes a description of the "benefits which permit Comcast to achieve cost savings by serving larger MDUs." Appeal at 17-18. However, because Comcast introduces this information for the first time on appeal to explain its bulk rate variations, we will not consider such evidence. Having not presented this information to the City, Comcast is not entitled to have the information considered on appeal.

[56] Resolution No. 94-R-0011 at 3, paragraph 4.

[57] *Id.*

[58] SBC Media Ventures, Inc. Appeal of Local Rate Order of Montgomery County, DA 94-1251 (Cab. Serv. Bur., released November 22, 1994) (*"SBC Media Ventures, Inc."*).

[59] *Id.* at 15.

not simply reduce all bulk rates offered by the operator to the lowest bulk rate offered to any MDU.[60] The text of the City's resolution indicates an intent to require Comcast to treat similarly situated MDUs in the same manner.[61] However, the language of the ordering paragraph in the City's resolution requires Comcast to reduce *all* MDUs to the lowest offered MDU bulk rate.[62] Consequently, the City's ordering paragraphs as drafted do not comply with our rules. Accordingly, we remand this issue to the City for compliance with our findings herein.

### D. ADDITIONAL OUTLET INSTALLATION CHARGES

#### 1. Positions of the Parties

23. Comcast's allowable rate for additional outlet installations was calculated by multiplying Comcast's HSC by the time necessary to complete an additional outlet installation. In setting this rate, the City adjusted the total time Comcast claimed was required for additional outlet installations. Specifically, the City rejected Comcast's claims regarding how much time is necessary to complete the installation of wire from the groundblock to the television ("ground block installation") that is done as part of the additional outlet installation.[63] Comcast claimed that such ground block installations require fifteen minutes.[64] The City, however, noted that Comcast had submitted information indicating that a connection or reconnection from the ground block to the television requires ten minutes, and that that task was the same as required to complete a ground block installation in connection with installing an additional outlet.[65] The City thus concluded that ground block installations done in connection with additional outlet installations should take the same amount of time -- ten minutes -- and used that amount in determining the total time required for an additional outlet installation.[66] The City's use of a ten minute ground block installation resulted in a lower rate for additional outlet installations than that computed by Comcast.

24. Comcast claims on appeal that there is no reasonable basis for the City's calculation of the additional outlet installation charge.[67] Comcast maintains that ground block installations require five additional minutes to complete when done in connection with the additional outlet installation as compared to when it is done for a connect or reconnect.[68] Comcast argues that there is no basis in the record for the City's conclusion that the time for additional outlet installation from the ground block to a subscriber's television set should not differ from a connect or reconnect from the ground block.[69] Comcast claims that it provided the City with actual cost data to justify the installation costs, and that the City must use that data to compute accurate charges.[70] Comcast argues that the rate allowed by the City does not cover the amount Comcast must pay its contractor to install an additional outlet or even the cost of materials.[71]

25. In opposition, the City argues that its calculation of the additional outlet charge was reasonable, and that Comcast did not meet its burden of justifying the claimed additional outlet installation costs. The City maintains that Comcast's own information indicated that the task of installing internal wiring from the ground block to the television requires ten minutes for a new unwired connection, ten minutes for a new pre-wired connection, but fifteen minutes for installation of an additional outlet.[72] The City asserts that it questioned Comcast on theissue of why ground block installations require more time when done for additional outlet installations than when done for connects and reconnects, but that Comcast never supported its claim that it took the additional five minutes.[73] The City argues that the facts asserted on appeal in Comcast's declaration were not supported on the record before the City, and that because Comcast has the burden of proof, it was reasonable for the City to rely on the best information available when it made its decision.[74]

26. The City maintains that there is no merit to Comcast's position that the additional outlet installation rate is unreasonable because it is lower than what Comcast's contractor's charges Comcast on a per installation basis.[75] The City also argues that the additional outlet installation charges it established are reasonable because the City followed the Commission's rules regarding the calculation of equipment and installation costs.[76] The City explains that it is to be expected that using an HSC that is based on average times and costs will result in rates for some tasks that are higher than the costs the operator actually incurs and rates for other tasks that are lower than

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[60] *Id.*

[61] Resolution No. 94-R-0031 at 7. The City states in its resolution on reconsideration: "Hence we also conclude it is consistent with the Congressional scheme and with FCC regulations to require an operator to charge lower competitive rates it chooses to offer in a franchise area to some MDUs *to all similarly situated MDUs*." *Id.* (emphasis added).

[62] Resolution No. 94-R-0011 at 3, paragraph 4.

[63] Reconsideration Order at 10-11.

[64] Opposition, Exhibit 7, Comcast Response to Additional Information, dated June 1, 1994, Attachment 3.

[65] Reconsideration Order at 11.

[66] *Id.*

[67] Appeal at 19-21.

[68] *Id.* at 19.

[69] *Id.* Comcast also claims that it had explained to the City's consultant why the ground block installation for an additional outlet takes five more minutes than for connection or reconnection from the ground block. As support for this proposition, Comcast relies on a declaration that was submitted with its Appeal but which was not in the record below. *Id.* at 20, citing Declaration of Sonya Moeller submitted with Comcast's Appeal. The declaration states that Ms. Moeller informed the City that the extra five minutes is related to extra time to route cable wiring and test the signal strength. Comcast Appeal, Declaration of Sonya Moeller, at 1. As noted *infra*, the City claims in its own declaration that Comcast did not in fact make the statements claimed in the City's declaration. Opposition at 23, n.53; Exhibit 18, Declaration of Garth Ashpaugh, dated September 2, 1994.

[70] Appeal at 21.

[71] *Id.* at 19-21.

[72] Opposition at 23 (citing Comcast Response to Additional Information, dated June 1, 1994, Attachment 3).

[73] Opposition at 23.

[74] *Id.* The City also submitted with its Opposition a declaration of its consultant stating that he had not been informed of the information included in Comcast's declaration. Opposition at 23, n.53; Exhibit 18, Declaration of Garth Ashpaugh, dated September 2, 1994.

[75] Opposition at 24. The City also claims that the record shows that the allowed rate for additional outlets does in fact cover what Comcast pays to its contractors. *Id.* at 24-26.

[76] *Id.* at 24.

the costs the operator actually incurs.[77] The City states that "this is the result of an HSC which assumes all tasks are paid for at the same hourly rate, even if they are not in fact."[78]

27. In its Reply, Comcast relies again on its declaration as evidence that it did in fact provide an explanation as to why it required additional time for ground block installations in connection with additional outlet installations.[79] Finally,Comcast states that the City's discussion of the HSC and the resulting installation rates is irrelevant because it is based on "some vague argument that Comcast need not recover the full cost of its installations in all cases."[80]

**2. Discussion**

28. We find that there is a reasonable basis for the City's calculation of Comcast's additional outlet installation charges. The record demonstrates that the City's consultant relied on a "Schedule of Installation Times" provided by Comcast for determining that Comcast was claiming more time for a ground block installation when that task was completed in conjunction with an additional outlet installation as opposed to when it was done with connections or reconnections.[81] It was thus reasonable for the City to question the need for the additional time. The record further demonstrates that it was reasonable for the City to conclude that Comcast had not met its burden of explaining the five minute differential. In its response to the City's Draft Reconsideration Order, Comcast did not explain the need for the additional time.[82] Nor is there any other evidence in the record below of an explanation of the need for additional time to install the ground block.[83] Based on the foregoing, we believe it was reasonable for the City to find that Comcast had not adequately explained the need for the additional time.

29. We also reject Comcast's argument that the rates adopted for additional outlet installations are unreasonable because they do not cover what Comcast is charged by its contractors on a per-job basis. Comcast is incorrect in maintaining that the allowable rate for an additional outlet installation must be greater than the charge Comcast's contractor levies on a per-job basis. As noted, Comcast's rate for additional outlet installation was based on the HSC. The HSC is designed to allow an operator to recover the costs of service installation and maintenance of customer equipment. The HSC is calculated by computing an operator's annual capital costs plus expenses for the maintenance of customer equipment and the installation of service. This cost figure is entered on Line 3, Step A of Form 393. That figure is then divided by the total number of person-hours spent in those activities over the past year. The person-hours figure is entered on Line 4 and the HSC, Line 3 divided by Line 4, is entered on Line 5.[84] Comcast's contractor costs are thus accounted for in the total cost figure in Step A. Because the HSC is based on the sum of all expenses incurred performing all of the various services to which the HSC applies and the sum of all the time spent performing all of the services, the HSC is an average charge for all services. The result of the averaging calculation, however, is that the allowable rate for any one maintenance or installation job will not necessarily equal the costs attributable to that task that were included in the sum of the maintenance and installation expenses. The use of the HSC ensures that overall the operator will recover all of its maintenance and installation costs. Consequently, contrary to Comcast's argument, the fact that its allowed additional outlet installation rate may be lower than what its contractor's charges for those services on a per-job basis, does not render the additional outlet rates unreasonable.[85] Therefore, we find that the City reasonably calculated Comcast's additional outlet installation rates.

**E. SUBSCRIBER DROPS**

**1. Positions of the Parties**

30. In analyzing Comcast's Form 393, the City's consultant determined that Comcast should have included in its calculation of the HSC the labor hours and labor costs associated with the installation of subscriber drops.[86] The consultant thus recalculated the HSC so as to include such labor hours and costs. In its Reconsideration Order, the City adopted the consultant's calculation of the HSC.[87]

31. On appeal, Comcast maintains that the City included the capital costs of subscriber drops in the equipment basket on Schedule B of Form 393, and that it was inappropriate to do so. Comcast argues that Schedule B only applies to operating expenses associated with regulated equipment, not equipment itself, and therefore subscriber drops could not be included on Schedule B.[88] Comcast

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[77] *Id.* at 24-26.

[78] *Id.* at 25-26.

[79] Reply at 11-12. Comcast also disputes the City's assertion that the allowed rate for additional outlet installations covers the charges paid to Comcast's contractors. *Id.* at 12.

[80] *Id.*

[81] Beck Addendum at 6.

[82] Comcast July 5, 1994 letter, at 5. Comcast argued only that the additional outlet charge should be higher in order to cover its contractor's charges for such installations.

[83] While Comcast claims in its declaration submitted with its appeal that it provided the City's consultant with an explanation of the additional time requirement, the City through its own declaration disputes Comcast's claim. Because this is not a trial *de novo*, we need not address evidence submitted for the first time on appeal. However, we note that Comcast's declaration that it made its explanation "near the end of June 1994" is inconsistent with its statements in its July 5, 1994 letter. In that letter, Comcast stated that it was "unclear as to what the consultant means [in its Addendum] by noting that 'Comcast has not supported the need for the extra five minutes.'" Opposition, Exhibit 13, Response by Comcast to Draft Reconsideration Order, at 5 (July 5, 1994). Comcast did not in the July 5, 1994 letter indicate that it had previously explained the five minute differential; and Comcast's sole focus on whether the allowed rate covers the contractor's charges suggests that Comcast believed that it did not need to provide such an explanation. *See id.*

[84] FCC Form 393, Instructions for Equipment and Installation Charges, Step A.

[85] Further, in its analysis, the City's consultant determined that overall Comcast was not under-recovering on its service charges. Beck Reply at 4; *see also* Reconsideration Order at 11, n.11.

[86] Appeal, Exhibit J, July 8, 1994 letter from R.W. Beck replying to Comcast's July 5, 1994 comments on draft reconsideration order, at 7. (R.W. Beck's July 8, 1994 letter is referred to hereafter as the "Beck Reply.")

[87] Reconsideration Order at 13-15; Resolution No. 94-R-0031 at 13-15.

[88] Appeal at 21.

claims that if the capital costs of subscriber drops were to be included anywhere, it would be in Schedule C, Capital Costs of Customer Equipment. Comcast notes, however, that the Commission has explicitly stated that subscriber drops are not regulated equipment and should not be included in Schedule C.[89] Comcast also maintains that the labor hours associated with installation of subscriber drops are properly included as a component of installation charges,[90] but states that it "*removed* labor costs associated with cable drops from the HSC calculation."[91]

32. In opposition, the City claims that it did not require Comcast to include capital costs of subscriber drops in Schedule B or Schedule C.[92] The City claims that it ruled only that if non-capital labor costs and hours associated with installing drops are recovered through installation charges, then these labor costs and hours must be included in the HSC calculation.[93] The City claims that by not including the labor costs and hours in the HSC calculation, Comcast is able to develop a higher HSC than it should.[94]

**2. Discussion**

33. We find that the City treated Comcast's subscriber drops properly. In a *Public Notice* we issued May 13, 1993, we stated:

> Subscriber/customer drops are considered network equipment and may not be included as customer equipment in Part III, Schedule C. Subscriber drops, however, are often installed at the time of service installation. In that instance, the time it takes to install a subscriber drop may be included in the actual or average time it takes for that type of service installation. Thus, although the cost of the actual equipment will not be recovered in an equipment charge, the cost of installing a drop at the time of service installation may be recovered in the installation charge.[95]

34. With respect to the treatment of labor costs associated with installation of customer drops, we further explained in the HSC calculation instructions in Form 1205 (one of the successors to Form 393) that operators have another option in addition to recovering such costs through the installation charge. The other option is for the operator to capitalize [the labor costs] in distribution plant as part of the cost of drops.

35. Commission rules thus allow one of two options for the recovery of the labor related to the installation of subscriber drops at the time of service installation. These options are: (1) to recover the labor costs associated with the installation of subscriber drops through the installation charges; or (2) to capitalize such costs in distribution plant as part of the cost of drops.[96] Under the first option, related labor costs and labor hours should be included in the calculation of the HSC (in Part III, Step A, Lines 1 and 4). This is required by the HSC formula in order to ensure that the HSC is properly based on all the activities to which it applies.[97] Under the second option, the labor cost for drops is recovered in the charges for cable services only – not in installation or customer equipment charges.[98]

36. Comcast makes it abundantly clear that it elected the first option – to recover the cost of labor associated with the installation of subscriber drops through the installation charge.[99] Thus, Comcast calculates its installation charge by including subscriber drop installation labor hours in determining the overall installation time, and then multiplying the overall time by the HSC.[100] It is clear, however, that Comcast did not include the labor costs and labor hours associated with the installation of subscriber drops in the calculation of the HSC. Comcast stated unequivocally that Comcast "*removed* labor costs associated with cable drops from the HSC calculation."[101] This removal is inconsistent with the procedures for recovering subscriber drop labor costs through the installation charges, whereby Comcast is required to include the labor costs and labor hours associated with subscriber drop installations in the calculation of the HSC.

37. In contrast, the City's methodology treated subscriber drops appropriately because it included in the HSC calculation the time associated with subscriber drop installations.[102] Further, Comcast's arguments mischaracterize the City's actions with respect to the treatment of subscriber drops. Contrary to Comcast's arguments, the City did not include the capital costs of the subscriber drops in Schedule B. The City's approach differed from Comcast's only with respect to the inclusion of subscriber drop labor hours and labor costs in the HSC calculation.[103] We thus find that the City's treatment of Comcast's subscriber drops was correct and reasonable.

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[89] *Id.* at 22 (citing Public Notice, Cable Television Rate Regulation, Questions and Answers, Question 35, at 11-12 (May 13, 1994) (*"May 13, 1994 Public Notice"*)).

[90] Appeal at 22, 23. While Comcast acknowledges that it removed labor costs associated with cable drops from the calculation of the HSC, Comcast does not address the issue of whether it was appropriate for it to do so. *See id.* at 24.

[91] *Id.* (emphasis in original).

[92] Opposition at 27, n.59. The City thus claims that Comcast misrepresents the City's calculation and analysis.

[93] *Id.* at 26-27.

[94] *Id.* at 27.

[95] *May 13, 1994 Public Notice*, at 11-12. The Commission further explained in its *First Reconsideration Order:* "The charge for service installation is to be calculated on the basis of the hourly service charge (HSC). This charge includes the direct labor as well as the capital costs of the service installations. . . . . The installation labor may include all labor from the drop inward, including the cost of labor to install the drop and connections." Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164, 1200-1201 (1993) (*"First Reconsideration Order"*).

[96] *See* Instructions to Form 1205.

[97] *See* 47 C.F.R. § 76.933(d).

[98] Form 1205, at 14 (Worksheet for Calculating Permitted Equipment and Installation Charges, Step A: Hourly Service Charge, Note 2).

[99] Appeal at 24 ("Consistent with the Commission's policy, Comcast instead chose to include labor costs as part of its installation charge when initial installations require cable drop installation").

[100] *See* Appeal, Exhibit Q (Comcast Version Form 393), at Attachment 4.

[101] Appeal at 24 (emphasis in original).

[102] Beck Reply at 7.

[103] *See* Beck Reply at 7; Beck Reply Version Form 393, Part II, Schedule B.

## F. CONVERTER AND REMOTE DEPRECIATION SCHEDULES

### 1. Positions of the Parties

38. In calculating the allowable rates for remote control units, and converters, the consultant used a different method for allocating costs among the different equipment groups (remotes and converters) than that used by Comcast.[104] The consultant used a different allocation method because it found that Comcast used an incorrect depreciation schedule for its remotes. Comcast had depreciated remotes over a two-year schedule, but the consultant found that Comcast had not supported that schedule and that in fact Comcast had historically depreciated remotes over a longer, six-year schedule.[105] The consultant thus used a six-year depreciation schedule for remotes, and accordingly adjusted the allocation of costs between the different equipment groups.

39. In its Appeal, Comcast argues that it was inappropriate for the City to adjust the remote depreciation schedule.[106] Comcast claims that it "historically has accounted for remote controls, addressable converters, and non-addressable converters in aggregate and depreciated these assets over the same time period."[107] Comcast maintains though that it "recognized that the average useful life of a remote is just two years, compared to the average six-year life of a converter, and developed a supplemental schedule to allocate the converter cost pool."[108] Comcast claims that the City's consultant ignored the differences in equipment lives, and calculated a rate that does not cover the purchase price of the remote control unit plus a reasonable profit.[109] Comcast argues that because its methodology for generating equipment rates is reasonable, we must reverse the City with respect to the equipment rates the City established.

40. In its Opposition, the City argues that it is Comcast that ignores the differences in asset lives because Comcast historically has depreciated remotes over the same period as converters.[110] The City claims, as noted in its Reconsideration Order, that Comcast's methodology results in Comcast basing its rate for remotes on gross book values that are "almost three times the amount Comcast pays."[111] The City maintains that it nonetheless considered Comcast's arguments regarding the rates for remotes, but rejected them after complete analysis by its consultant.[112] The City cites to its Reconsideration Order which indicates, among other things, that it found that Comcast failed to adequately support the use of a two-year asset life for remotes.[113] The City argues that Comcast has not established that the City's conclusions were unreasonable based on the information available to the City.[114]

41. In its Reply to the City's Opposition, Comcast argues that it should not be "penalized" for its prior accounting system which was used in an unregulated environment.[115] Comcast also presents an explanation of why converters have a longer life than remotes.[116]

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104 Reconsideration Order at 22-23, n.19.
105 Beck Reply at 10.
106 Appeal at 24.
107 *Id.*
108 *Id.* at 25.
109 *Id.*
110 Opposition at 28.
111 *Id.* (citing Reconsideration Order at 22).
112 *Id.* at 28-29.
113 *Id.* at 29 (citing Reconsideration Order at 22-23, n.19).
114 *Id.* at 29.
115 Reply at 13.
116 *Id.* at 14.

**2. Discussion**

42. Comcast's arguments regarding the City's adjustment of the asset depreciation lives do not persuade us that the City acted unreasonably. We find it was reasonable for the City's consultant to question the overall reasonableness of Comcast's proposed rates for remote control units. Pursuant to our rules, subscriber charges for equipment leased to subscribers shall not exceed charges based on actual costs, plus a reasonable profit.[117] However, in its Form 393, Part III, Schedule C, Comcast allocated a gross book value of $269,759 to 15,622 remotes resulting in a gross book value unit cost of $17.27 and a net book value unit cost of $7.85 for each leased remote which has an average purchase price of $5.50.[118] The significant gross book value unit cost variance of 214% and net book value unit cost variance of 42.7% for remotes which are 54.5% depreciated lead us to question the reasonableness of Comcast's calculation of the monthly rate for its remotes, its costs allocation methodology, and its compliance with our rules.

43. The record also demonstrates that the City had a reasonable basis for making the adjustments to the remote depreciation schedules. Comcast raised the remote depreciation issue in its July 5, 1994 letter regarding the draft of the reconsideration order.[119] The City's consultant responded to Comcast's arguments in its reply dated July 8, 1994 (referred to as the "Beck Reply"). In the Beck Reply, the consultant stated that despite repeated requests, "not a single supporting document has been provided" to demonstrate that remotes have only a two year life.[120] Beck noted that the only evidence regarding the asset lives of Comcast's remotes is the ledger sheets that depreciate remotes over six years.[121] Comcast has not pointed to any evidence to support the two year depreciation schedule and thus we find it was reasonable for the City to hold that Comcast had not met its burden of supporting its depreciation methodology. Based on the foregoing, we find that the City acted reasonably with respect to adjusting the depreciation lives for remote units and the calculation of Comcast's allowable equipment rates.

**G. ADJUSTMENTS TO INSTALLATION HOURS**

**1. Positions of the Parties**

44. In its Reconsideration Order, the City rejected Comcast's methodology for calculating the total installation labor hours figure that is necessary in the calculation of the HSC.[122] The City instead adopted its consultant's calculation of the totalinstallation labor hours.[123] At issue was the determination of the number of hours worked by contractors hired by Comcast. Because Comcast did not keep track of the actual hours worked by its contractors, Comcast had calculated those hours using a "contractor equivalent" based on the total costs Comcast incurred in using contractors. Comcast calculated its contractor equivalent hours by dividing the total amount paid to contractors in 1992 by Comcast's 1993 budgeted average salary, vehicle expense and tools cost.[124] However, based on information provided by Comcast regarding installation tasks, the City's consultant concluded that Comcast's contractor equivalent calculation was flawed and therefore developed its own calculation of the contractor labor hours.[125] Beck calculated the contractor labor hours using the information provided by Comcast regarding the tasks involved in installation and maintenance of customer equipment, the time required for such tasks, and the total installation and maintenance activities performed by contractors in 1992.[126] The consultant's methodology resulted in a total maintenance and installation labor hours figure of 43,229; Comcast's methodology had resulted in a figure of approximately 31,000.[127] Using the consultant's higher figure resulted in a lower HSC than that computed by Comcast.

45. On appeal, Comcast argues that it was improper for the City to disallow Comcast's methodology for computing equivalent contract installer hours.[128] Comcast claims that its methodology should have been used because it is consistent with the Commission's methodology for computing contractor hours with respect to equipment repairs. Claiming that contractor repair work is analogous to contractor installation and maintenance work, Comcast relies on the instructions to FCC Form 1205 (the successor to Form 393) which explain how to calculate "equivalent labor hours" for repair work.[129] Comcast claims that the consultant's interpretation of the Form 1205 equipment repair hours instructions is incorrect and hence that the consultant's rejection of Comcast's comparable installation calculation was unreasonable.[130] Comcast claims that the City disallowed Comcast's calculation in part because it found that Comcast's contractors are more expensive than in-house labor, and that such reasoning is inconsistent with Commission rules and policies.[131]

46. In its Opposition, the City argues that the contractor equivalent calculation that it used was reasonable and that the City had a reasonable basis on which to reject the total labor hours figure proposed by Comcast. The City explains that based on information provided by Comcast regarding the number of tasks performed by contractors and the time required for various tasks, the consultant was able to determine that Comcast's calculated total contractor installation figure significantly underestimated the actual contractor

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[117] 47 C.F.R. § 76.923.

[118] Appeal, Exhibit Q, Comcast Version FCC Form 393, Attachment 3.

[119] Comcast July 5, 1994 letter, at 9.

[120] Beck Reply at 10.

[121] *Id.* Beck also stated that the rate recommended for remotes is adequate to compensate Comcast fully for all costs associated with remotes. *Id.* The City's Reconsideration Order also demonstrates that the City considered Comcast's arguments and Beck's recommendations. *See* Reconsideration Order at 22-23, n.19.

[122] The total maintenance and installation labor hours figure is used in Line 4, Part III of Form 393.

[123] Reconsideration Order at 16-19.

[124] *See* Beck Addendum at 7.

[125] *Id.*

[126] Beck Addendum, Appendix E.

[127] Appeal, Exhibit J, Beck Reply Version Form 393, Part III, Line 4; Exhibit Q, Comcast Version Form 393, Part III, Line 4.

[128] Appeal at 26.

[129] *Id.* at 26-27.

[130] *Id.* at 27. The consultant's explanation was provided in the Beck Reply.

[131] *Id.* at 27-28. Comcast claims, nonetheless, that its costs of using in-house labor are comparable to the costs of using contractors. *Id.* at 28.

installation hours.[132] The City claims that contrary to Comcast's arguments, "it disallowed Comcast's methodology because it did not account for the hours required to performed the tasks Comcast reported, not merely because the City assumed contractor labor is cheaper than in-house labor."[133] The City argues that in calculating the HSC, the goal is to include actual costs and hours as far as possible, and that Comcast's contractor equivalent methodology "ignored thousands of hours the record indicates were actually spent performing installation and maintenance of customer equipment."[134] The City argues that the Commission does not have an "installer conversion formula," and that whether the consultant interpreted the Commission's repair equivalent hour calculation correctly is irrelevant because the City had a reasonable basis on which to determine that Comcast's calculation was unreasonable.[135]

47. In its Reply, Comcast argues that even though the Commission has not addressed the issue of calculating contractor installation hours for the purpose of calculating the HSC, the City does not have the authority to prescribe a methodology that is inconsistent with the policy discussed in the instructions forcalculating equipment repair contractor hours.[136] Comcast claims that if an operator pays a contractor to perform installation work, the important fact is "not the number of hours that it takes the third party to perform the work, but the *cost* that the operator incurred."[137] Comcast argues that the goal of the HSC is to include only actual costs incurred by an operator, as opposed to actual costs *and hours* as claimed by the City. Comcast asserts that the City's method is inconsistent with this goal because it inflates actual cost by adding extra labor hours that the system did not incur.[138]

**2. Discussion**

48. We find that the City's rejection of Comcast's contractor equivalent labor hours calculation and its use of its consultant's calculation were reasonable. We believe it was reasonable for the consultant to use Comcast's information regarding installation and maintenance tasks as the basis for judging the overall reasonableness of Comcast's total labor figure. The record demonstrates that the consultant was justified in determining that Comcast's labor figure likely underestimated the actual hours incurred.

49. We also agree with the City that Comcast's contractor equivalent calculation used inappropriate data. Pursuant to the instruction to Form 393, the values used in the completion of FCC Form 393, Part III should be based on "the past year" or a representative month.[139] In calculating the equivalent hours, Comcast divided its 1992 total contractor costs by average 1993 cost figures. The use of 1993 cost figures is thus inconsistent with the form's instructions and with the use of 1992 contractor costs. We also agree with the City that the average employee costs used by Comcast included cost factors that are not pertinent to determining the cost of a contractor's employee.

50. Finally, we disagree with Comcast's argument that its contractor equivalent calculation is reasonable because the goal of the HSC is to include only actual costs incurred by an operator, and not actual hours worked. Determining the actual hours worked is an integral part of calculating the HSC. Indeed, Line 4 of Part III, FCC Form 393 records the total labor hours incurred. Thus, while the overall goal of the HSC is to capture an operator's costs, it is central to the calculation of the HSC that the operator's total labor hours be recorded accurately. We are thus unpersuaded by Comcast's argument that the City's methodology is inconsistent with the goals of the HSC calculation.

## H. ADJUSTMENTS TO DISPATCHER TIMES

**1. Positions of the Parties**

51. In calculating its HSC, Comcast included an amount of time spent by a dispatcher arranging installation and maintenance activities. Comcast had determined that 50 percent of its dispatchers' time is spent on tasks associated with installation and maintenance functions. In its Form 393, Comcast thus included 50 percent of the total hours worked by its dispatchers in the calculation of the HSC.[140] The City's consultant, however, found that Comcast did not adequately support its allocation of 50 percent of the dispatchers' time. Based on information submitted by Comcast, the consultant determined that Comcast's dispatcher functions are closely aligned with the installer functions, and thus used the same allocation (90 percent) for dispatchers as was used for installers.[141]

52. On appeal, Comcast argues that the consultant's adjustment was arbitrary because the consultant allegedly disregarded the detailed information that Comcast provided regarding the job function of its dispatchers.[142] Comcast claims that the information it provided is the best information available and there was no indication that the personnel who supplied the information were unreliable or inaccurate.[143] Comcast asserts that "[e]ven after numerous conversations," the City's consultant maintains that Comcast's figures are improper.[144] Comcast thus claims that there is no rational basis for the consultant's rejection of Comcast's estimate.[145]

53. The City argues in its Opposition that its basis for rejecting Comcast's estimates is rational and is fully evident in the Reconsideration Order's discussion of the dispatcher issue.[146] The City maintains that it based its 90 percent allocation on the actual work performed as reported by Comcast in its information regarding the estimates of dis-

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[132] Opposition at 30-31.
[133] *Id.* at 32. The City also disputes that it found that Comcast's contractors to be more expensive than in-house labor. *Id.* at n.69.
[134] *Id.* at 32.
[135] *Id.*
[136] Reply at 14-15.
[137] *Id.* at 15 (emphasis in original).
[138] *Id.* at 16.
[139] FCC Form 393, Instructions for Equipment and Installation Charges, at 27.
[140] Appeal, Exhibit Q, Comcast Version Form 393, Attachment 2; *see also* Appeal, Exhibit H, Comcast June 21, 1994 letter, Attachment A (indicating a revised 55 percent allocation).
[141] Beck Addendum at 6; Beck Report at 13.
[142] Appeal at 29-30; Reply at 17.
[143] Appeal at 30.
[144] *Id.*
[145] *Id.* at 30-31.
[146] Opposition at 33-34.

patcher time involved in specific tasks.[147] The City claims that it considered all of Comcast's data and that it was entirely reasonable for the City to have been skeptical of that data.[148] The City maintains that Comcast's 50 percent allocation was not supported by the record. The City states that Comcast failed to provide the notes and information required to allow the City to judge the reliability of Comcast's estimates.[149]

**2. Discussion**

54. While Comcast claims that the City disregarded Comcast's information, the record indicates otherwise. In the Beck Addendum, the consultant noted that although Comcast had provided some information concerning its dispatchers' responsibilities, Comcast had not provided specific types of information necessary to adequately support Comcast's allocation of 50 percent of the dispatchers' time to the HSC. Specifically, Beck noted that Comcast had not provided information regarding the number of hours per week that a dispatcher normally devotes to each function of the dispatcher's job, an assessment as to what are the most important aspects of the job, or a detailed description of each of the duties of the job.[150] The consultant also noted that some of the information that Comcast did provide (at a June 14, 1994 meeting) actually demonstrated that more than 50 percent of the dispatcher time relates to the installation and service functions. Among the duties listed by Comcast for the position of dispatcher, the following were included: 1) compiling, scheduling, assigning and printing all technical and installation work orders; 2) maintaining radio communication with and monitoring the location of all field personnel; 3) scheduling customer disconnects; 4) answering customer service-related phone inquiries after 5:30 pm; 5) compiling, maintaining and preparing workload and operational reports; 6) monitoring sytem picture quality; and 7) distributing work orders to appropriate personnel.[151] Beck determined that this information supported the conclusion that the duties of the dispatcher are closely aligned with those of the installers, and therefore Beck found that dispatcher time should get the same allocation (90 percent) as was done for installers.[152] Our review of the record indicates that the City considered all of Comcast's evidence, and that it was reasonable for the City to conclude that Comcast's evidence did not fully support Comcast's proposed allocation of 50 percent of dispatcher time to HSC related activities. As Beck noted, the "Dispatch Time Spent Related to HSC" table submitted by Comcast, does not provide specific information underlying Comcast's proposed allocations – it only states Comcast's allocations by category of dispatchers.[153] Moreover, Comcast's description of its dispatchers' job duties is not specific enough to support Comcast's 50 percent allocation over the City's 90 percent allocation.[154] We thus reject Comcast's claims that the City disregarded Comcast's evidence and arbitrarily established its own dispatcher allocation. We also find that Beck's conclusions based on the evidence in the record were reasonable and thus that there was a reasoned basis for Beck's dispatcher allocation and the City's endorsement of Beck's methodology.

**I. CABLEGUARD SERVICE CHARGE**

**1. Positions of the Parties**

55. In its rate orders, the City disallowed Comcast's Cableguard charge, which is a charge for the maintenance of customer-owned equipment and wiring. The City's order, relying on the report of the City's consultant, states that Comcast failed to justify the rate charged for the Cableguard service.[155] As a result, the City ordered that "Comcast may not charge a fee for Cableguard, or for maintenance of internal wiring until and unless it submits an appropriate filing supporting such a charge for review and approval by the City."[156] Comcast contends that the City's disallowance of the Cableguard rate was improper. Comcast argues that the City lacked the authority to disallow the Cableguard charge because the Commission was reviewing the matter in a letter of inquiry proceeding.[157] Comcast states that prior to September 1, 1993, it provided unlimited customer premises visits, regardless of the cause or source of the problem, at noadditional charge to customers.[158] It states that after September 1, based on historical data, it calculated the actual cost for providing the service at $0.45 per month.[159] Comcast also contends that it calculated the Cableguard charge on the basis of the HSC as required by Commission rules.[160]

56. The City argues that it is unclear under the Commission's rules whether a charge could be imposed for maintenance of internal wiring.[161] The City claims that even if Comcast could charge for the Cableguard service, Comcast did not meet its burden of supporting the proposed rate.[162] The City argues that there is a question as to whether the subscriber or Comcast owns the internal wiring. The City also claims that Comcast did not show that it had removed Cableguard costs from service and other equipment rates or that it had reasonably calculated the Cableguard charge based on the costs associated with maintaining internal wiring.[163] The City further maintains that the charge was inappropriate because it is a negative option billing practice.[164]

**2. Discussion**

57. The Commission examined the issue of Comcast's Cableguard charge in our decision relating to the letter of inquiry we issued to Comcast regarding negative option

147 *Id.* at 33.
148 *Id.* at 34-35 (quoting Reconsideration Order at 15-16).
149 Opposition at 33-34.
150 Beck Addendum at 5; *see also* Reconsideration Order at 15; Beck Report at 13; Beck Reply at 7.
151 Comcast provided the City with a general job description for its dispatcher position taken from a job posting. *See* Beck Addendum, Appendix E.
152 Beck Addendum at 5-6; Beck Report at 13.
153 See Appeal, Exhibit H, Attachment A to June 21, 1994 letter from Peter H. Feinberg to Garth T. Ashpaugh.
154 *See* note 150 *supra*.
155 Resolution No. 94-R-0011 at 5. The City did leave open the possibility for Comcast to justify and implement the Cableguard charge in the future. The City stated:
156 Resolution No. 94-R-0031 at 2.
157 Appeal at 31.
158 *Id.* at 32.
159 *Id.*
160 *Id.* at 33; Reply at 18.
161 Opposition at 35.
162 *Id.* at 36.
163 *Id.* at 36-37.
164 *Id.* at 37.

billing issues. In that decision, *Comcast Cablevision of Tallahassee Letter of Inquiry on Negative Option Billing Issue*,[165] we found that Comcast's automatic subscription of its customers to a separate wire maintenance program created by the unbundling of Comcast's programming service rates from equipment charges did not violate the negative option billing provisions of federal law. We did not address in that case the issue of the reasonableness of the Cableguard charge or the legality of, or any other issue relating to, the wire maintenance plan itself.[166]

58. In its Reconsideration Order, the City cites the negative option billing issue as one basis upon which it disallowed Comcast's Cableguard charge.[167] We find that the City's determination regarding the negative option billing status of Comcast's Cableguard charge is inconsistent with the action taken in *Comcast Cablevision of Tallahassee Letter of Inquiry on Negative Option Billing Issue*. Accordingly, we are remanding this issue to the City so that it can enter an order consistent with our findings in that decision.

59. In its Reconsideration Order, the City also found that Comcast had not adequately justified the reasonableness of the Cableguard charge. The City found that Comcast had not shown that it had removed Cableguard costs from service and other equipment rates or that it had reasonably calculated the charge based on the costs associated with maintaining internal wiring.[168] The City also questioned whether our rules allow Comcast to offer and charge for plans for the maintenance of customer-owned equipment.[169]

60. Under our rules, an operator is permitted to sell customer premises equipment to subscribers, and may also offer service contracts for the maintenance and repair of equipment sold to subscribers.[170] If the subscriber owns the inside wiring, then pursuant to our rules, "the charge for a service contract shall be the HSC times the estimated average number of hours for -maintenance and repair over the life of the equipment."[171] If the operator owns the internal wiring, that wiring would be regulated equipment whose rate must be justified in Part III of Form 393. As regulated equipment, the monthly lease rate for the inside wiring would include maintenance costs. In that case, the operator could not charge an additional maintenance fee for inside wiring.[172]

61. In this case, the parties disagree as to whether it is the subscriber or the company that owns the inside wiring. Comcast claims that it transfers ownership of inside wiring at the time of installation.[173] The City claims, however, that it is unclear whether all of Comcast's customers are parties to the type of contract relied upon and whether the contract is enforceable as a matter of Florida law.[174] The evidence in the record is insufficient for us to determine whether all those customers being charged for the Cableguard maintenance plan are in fact parties to the type of installation contract submitted by Comcast. Nor is it our place to determine the validity of the contract under Florida law. Nonetheless, we do not need to settle the ownership issue in order to resolve the Cableguard issue.

62. Pursuant to the our rules, irrespective of who owns the inside wiring, Comcast was required to provide evidence as to the costs and labor hours associated with the maintenance of the inside wiring. If the inside wiring is customer-owned, then such information is needed to identify what hours and costs have been included in the calculation of the HSC and for calculating the average charge; if the inside wiring is company-owned, then the information is needed to support the inside wiring lease rate. The record indicates that Comcast failed to make the necessary showing to identify costs and labor hours associated with the maintenance of the inside wiring. Comcast claims that "the Cableguard service charge is based on historical repair data," and that it calculated the Cableguard charge based on the HSC. Comcast also claims that it provided the City with information regarding service calls related to customer equipment. However, there is no evidence in the record that supports these claims. The only evidence cited to by Comcast is a "Service Call Report 12 Months Summary" which indicates that 10.40% of all service calls were "subscriber related."[175] We agree with the City that this evidence is insufficient because it does not indicate what portion of "subscriber related" calls involved maintenance of customer-owned inside wiring.[176] Thus it is not possible to determine from the Service Call Report whether Comcast accurately identified inside wiring maintenance costs. Accordingly, we find it was reasonable for the City to determine that Comcast had not adequately justified its proposed Cableguard charge. However, we find that it was unreasonable for the City to entirely disallow the

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[165] Comcast Cablevision of Tallahassee Letter of Inquiry on Negative Option Billing Issue, DA 95-61 (Cab. Serv. Bur. released January 20, 1995).

[166] *Id.* at 8.

[167] Reconsideration Order at 27.

[168] *Id.* at 26-27.

[169] *Id.* at 26.

[170] 47 C.F.R. § 76.923(i); *Rate Order*, 8 FCC Rcd at 5817-18; *First Reconsideration Order*, 9 FCC Rcd at 1201 n.100. 47 C.F.R. § 76.923(i) states:

> A cable operator may sell customer premises equipment to a subscriber. The equipment price shall recover the operator's cost of the equipment, including costs associated with storing and preparing the equipment for sale up to the time it is sold to the customer, plus a reasonable profit. An operator may sell service contracts for the maintenance and repair of equipment sold to subscribers. The charge for a service contract shall be the HSC times the estimated average number of hours for maintenance and repair over the life of the equipment.

[171] 47 C.F.R. § 76.923(i).

[172] *See* 47 C.F.R. § 76.923(a)(4); *First Reconsideration Order*, 9 FCC Rcd at 1200.

[173] As evidence of such ownership transfer, Comcast submits a customer order form which states that "all cable, connectors, and mounting hardware installed by Company shall, upon installation, become a fixture on the premises and shall become the property of the owner of the premises." Appeal, Exhibit N, at 52.

[174] Opposition at 35-36, n.70.

[175] Opposition, Exhibit 9(m), at Exhibit E, page 5.

[176] Moreover, if it were established that the customer does have ownership of the inside wiring, Comcast must also demonstrate, as the City required, that Comcast properly included all relevant costs and labor hours in the calculation of the HSC, and that Comcast has properly excluded all inside wiring maintenance costs from the calculation of all other equipment lease rates.

Cableguard charge. We therefore will remand this issue to the City with instructions that Comcast provide the City, within ten (10) days of the release of this order, with detailed information necessary to justify the calculation of the Cableguard charge. If Comcast fails to provide adequate information, the City should set the Cableguard rate based on the best information available.

### J. A LA CARTE PACKAGE

#### 1. Positions of the Parties

63. In its rate orders, the City found that Comcast's "Value Pak" is a regulated service.[177] Comcast's Value Pak is a collective offering of four channels, The Family Channel, The Nashville Network, Turner Network Television ("TNT"), and WTBS-Atlanta.

64. Comcast asserts that the City improperly treated its Value Pak by considering it as a regulated tier. Comcast argues that the Value Pak service comports with the interpretative guidelines the Commission established in its *Second Reconsideration Order* and the standards the Commission adopted in its *Rate Order*.[178] Comcast further contends that it was for the Commission, not the City, to determine the validity of Comcast's a la carte package as part of the Commission's inquiry into Comcast's rates.[179] The City defends its action with respect to the Value Pak as a reasonable application of the Commission's rules.[180]

#### 2. Discussion

65. The a la carte package at issue was first offered to Comcast's subscribers on September 1, 1993, the effective date of our regulation. As a result of restructuring, Comcast offered the four channels on an individual basis and also as a package that Comcast alleges is not subject to regulation. WTBS was originally offered on Comcast's Limited Service tier; The Family Channel, The Nashville Network and TNT were originally offered on Comcast's Satellite Service tier.

66. The Commission examined the exact issue of Comcast's Value Pak in our decision relating to the letter of inquiry we issued to Comcast regarding its a la carte offerings. In that decision, *Comcast Cablevision of Tallahassee Letter of Inquiry on A La Carte Issue*,[181] we found that we could not say that it was clear that the a la carte package at issue in this appeal was not a permissible non-rate regulated offering under our rules.[182] We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers.[183] Instead, we found that the a la carte package at issue in this appeal may be treated as a new product tier under the Commission's *Going Forward Order*.[184]

67. We find that the City's determination that Comcast's Value Pak is a regulated tier is inconsistent with the action taken in *Comcast Cablevision of Tallahassee Letter of Inquiry on A La Carte Issue*. We further find that, in accordance with that decision, Comcast's a la carte package should not be treated as a rate regulated tier of service. Accordingly, we are remanding this issue to the City so that it can enter an order consistent with our findings in *Comcast Cablevision of Tallahassee Letter of Inquiry on A La Carte Issue*.

### IV. ORDERING CLAUSES

68. Accordingly, IT IS ORDERED that the appeal by Comcast of the City's order regarding the benchmark calculation is REMANDED to the City so that it can enter an order consistent with our findings herein.

69. IT IS FURTHER ORDERED that the appeal by Comcast of the City's order regarding the data used in completing Form 393 is DENIED.

70. IT IS FURTHER ORDERED that the appeal by Comcast of the City's finding that Comcast failed to justify its bulk rates is DENIED.

71. IT IS FURTHER ORDERED that the appeal by Comcast of the City's order that Comcast reduce its bulk service rates so that no bulk service customer is charged a rate higher than the lowest bulk rate in effect on September 1, 1993 is REMANDED to the City so that it can enter an order consistent with our findings herein.

72. IT IS FURTHER ORDERED that the appeal by Comcast of the City's determination of additional outlet charges is DENIED.

73. IT IS FURTHER ORDERED that the appeal by Comcast of the City's order regarding the City's treatment of subscriber drops in the calculation of the hourly service charge is DENIED.

74. IT IS FURTHER ORDERED that the appeal by Comcast of the City's order regarding the City's adjustment of equipment depreciation schedules is DENIED.

75. IT IS FURTHER ORDERED that the appeal by Comcast of the City's order regarding the City's adjustments to installation hours is DENIED.

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[177] Resolution No. 94-R-0011 at 4, adopting March 3, 1994 R.W. Beck Report at 9-11; Resolution No. 94-R-0031 at 2 (reaffirming Resolution No. 94-R-0011).

[178] Appeal at 35-39.

[179] *Id.* at 35.

[180] Opposition at 39-42.

[181] Comcast Cablevision of Tallahassee Letter of Inquiry on A La Carte Issue, DA 94-1275 (Cab. Serv. Bur. released November 18, 1994).

[182] *Comcast of Tallahassee*, DA 94-1275, at 8.

[183] *Id.* at 8-9.

[184] *Id.* at 9-10, citing Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 and 93-215, Sixth Order on Reconsideration and Fifth Report and Order, 10 FCC Rcd 1226 (1994) (*"Going Forward Order"*). New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order*, 10 FCC Rcd at 1233-1239. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993, and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

76. IT IS FURTHER ORDERED that the appeal by Comcast of the City's order regarding the City's adjustments to dispatcher times is DENIED.

77. IT IS FURTHER ORDERED that the appeal by Comcast of the City's disallowance of Comcast's Cableguard charge for the maintenance of customer-owned equipment is REMANDED to the City so that it can enter an order consistent with our findings in *Comcast Cablevision of Tallahassee Letter of Inquiry on Negative Option Billing Issue*, and with our findings herein.

78. IT IS FURTHER ORDERED that the appeal by Comcast regarding the City's treatment of Comcast's Value Pak is REMANDED to the City so that it can enter an order consistent with our findings in *Comcast Cablevision of Tallahassee Letter of Inquiry on A La Carte Issue*.

79. IT IS FURTHER ORDERED that our stay of the local rate order which was granted pending the resolution of this appeal is hereby VACATED.

80. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-109**

In the Matter of

Amendment of Section 73.202(b) RM-8665
Table of Allotments
FM Broadcast Stations
(Coolidge and Gilbert,
Arizona)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: June 30, 1995; Released: July 17, 1995**

**Comment Date: September 7, 1995**
**Reply Comment Date: September 22, 1995**

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making and a Petition for Reconsideration and Reinstatement Nunc Pro Tunc, filed by Rainbow Broadcasting, Inc. ("Petitioner"), licensee of Station KAZR(FM),[1] Coolidge, Arizona proposing the substitution of Channel 280C2 for Channel 280A and the reallotment of Channel 280C2 to Gilbert, Arizona, and the modification of Station KAZR(FM)'s license to specify Gilbert, Arizona, as its community of license.[2]

2. Petitioner states that its proposal complies with the requirements set forth in §1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM License*, 4 FCC Rcd 4870(1989), recon. granted in part, 5 FCC Rcd 7094 (1990). Petitioner states that the requested reallotment to Gilbert is mutually exclusive with the existing allotment of Channel 280A at Coolidge. Petitioner further states that the public interest would be served by the reallotment, since it would provide Gilbert (population 45,000) with its first local aural transmission service while Coolidge (population 6,934) would retain local aural transmission service through full-time Station KCKY(AM). In further support of its request, petitioner states that Gilbert is a recognized city in the state of Arizona, operates under the Mayor-City Manager form of municipal government and has its own police, fire and city maintenance/management. Petitioner claims that the reallotment of KAZR(FM) as a Class C2 facility at Gilbert will provide service to 1,418,890 persons as compared to 36,147 persons at Coolidge's currently licensed facility. There will be a net population gain of 1,382,743 within the 60 dBu service contour.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. However, we believe the proposal warrants consideration, since it would not deprive Coolidge of its only local aural transmission service, and its use is mutually exclusive with that of Gilbert. Since Gilbert is located in the Phoenix Urbanized Area, we question whether Gilbert should be credited with all of the aural transmission services licensed in the Phoenix Urbanized Area. Petitioner is requested to submit information sufficient to show that Gilbert is deserving of such a preference using the Commission's three factors enumerated in *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990) and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) and *Elizabeth City, North Carolina, and Chesapeake, Virginia*, 9 FCC Rcd 3586 (1994).

4. We also acknowledge petitioner's claim that its proposal will provide service to a larger population, and we must take into account the fact that existing service will be deleted from a community. With respect to evaluating proposals to change the community of license, the Commission has stated, "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting a channel from one community to another." *See Modifications, supra.*, 5 FCC Rcd at 7097 (1990); *see also, Report and Order (Eatonton and Sandy Springs, Georgia; and Anniston and Lineville, Alabama)*, 6 FCC Rcd 6580 (1991), *app. for rev. pend.* Since we are concerned with the loss of service to the community of Coolidge, we request petitioner to submit any additional information as the overall public interest benefits that would be advanced from grant of this proposal. We also request that the petitioner provide information showing the areas and populations which will lose existing service if Station KAZR(FM) is upgraded to Channel 280C2 and reallotted to Gilbert. The study should also indicate the number of reception services which are now available within the gain and loss areas.[3]

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[1] The petition was initially filed by FM 103 Broadcasting, Inc., former licensee of Station KAZR(FM). Rainbow consummated the assignment of license on April 14, 1994 (File No. BALH-940113GJ).

[2] The petition for rule making was originally dismissed by letter because Gilbert was located within the Phoenix, Arizona, Urbanized Area and we were unable to determine whether the proposal would result in a preferential arrangement of allotments. Petitioner has now added new information in an attempt to cure the deficiency. Procedurally, the petition for reconsideration is defective because the new material submitted by petitioner did not fall within any of the exceptions listed in §1.429 of the Commission's Rules, which set the rules for filing petition for reconsideration in allotment proceedings. Even though the petition for reconsideration could be properly denied under §1.429, petitioner could and we are certain would, file a new petition for rule making with the new information. Therefore, in order to streamline and expedite allotment processing in this case we will consider the petition for reconsideration as a new petition for rule making.

[3] Reception services are those aural broadcast services that can be received within a given geographical area, including full-time AM and FM commercial stations. In determining reception service provided by an FM station, the area of service circumscribed by the station's 1.0 mV/m signal contour should be considered, assuming maximum facilities for the class of station, except Class C. For Class C stations, the licensed facilities or the minimum Class C facilities, whichever is greater, should be

5. We believe petitioner's proposal warrants consideration. Channel 280C2 at Coolidge could be reallotted to Gilbert, Arizona since it may provide the community of Gilbert with its first local aural transmission service. A staff engineering analysis has determined that Channel 280C2 can be allotted to Gilbert in compliance with the Commission's minimum distance separation requirements with a site restriction of 28.8 kilometers (17.9 miles) east of the community.[4] In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 280C2 at Gilbert.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules for the communities listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Coolidge | 280A | - |
| Gilbert | - | 280C2 |

7. The Commission's authority to institute rulemaking proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **September 7, 1995**, and reply comments on or before **September 22, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant as follows:

Barry A. Friedman
Semmes, Brown & Semmes
1025 Connecticut Avenue, N.W., Suite 900
Washington, D.C. 20036

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 776-1660. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

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considered. The area of reception for full-time AM stations is defined according to whether it is a Class A AM station or another class of full-time AM station. For a Class A station, called a clear channel station, the reception area is defined by a station's 0.5mV\m groundwave contour, based on its licensed facilities. For allocation purposes, all other classes of full-time AM stations, reception service is defined as that service received within a station's *nighttime* interference-free contour. For purposes of determining the availability of aural services in the areas affected by a change of community proposal, a petitioner should include in its study reception services provided by all relevant AM and FM stations. Reception areas that receive at least five radio services are considered to be well served. Accordingly, within a given reception area, any count of radio services beyond five is unnecessary.

[4] The coordinates for this allotment are North Latitude 33-22-37 and West Longitude 111-28-55.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-100**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8509 |
| Table of Allotments, | RM-8549 |
| FM Broadcast Stations. | RM-8550 |
| (Okmulgee, Nowata, Pawhuska, Bartlesville, Bixby, Oklahoma, Rogers, Arkansas) | |

**ORDER TO SHOW CAUSE**

**Adopted: July 6, 1995; Released: July 17, 1995**

By the Chief, Allocations Branch:

1. At the request of Integrated Broadcasting Company, Inc. ("Integrated"), licensee of Station KTHK(FM), Okmulgee, Oklahoma, and KRIG, Inc. ("KRIG"), licensee of Station KRIG(FM), Nowata, Oklahoma, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 4882 (1994). Comments were filed by Rhema Media ("Rhema"), KRIG and Integrated. Counterproposals were filed by Singer Broadcasting Group, Inc. ("Singer"), Johnson Communications, Inc. ("Johnson") and KYFM Radio, Inc. ("KYFM").[1] Reply comments were filed by Singer,[2] KRIG and Integrated.

2. The *Notice* proposed the substitution of Channel 231C1 for Channel 231C2 at Okmulgee and the modification of Station KTHK(FM) to specify operation on the higher class channel. To accommodate the upgrade at Okmulgee, the *Notice* also optionally proposed the substitution of Channel 286C3 or Channel 285A for Channel 232A at Nowata, Oklahoma, and the modification of Station KRIG(FM) to specify operation on either channel. To accommodate the allotment of Channel 286C3 to Nowata, we also proposed the deletion, without replacement, of vacant and unapplied-for Channel 285A at Pawhuska, Oklahoma, or the substitution of Channel 280A for Channel 285A at Pawhuska, if an interest in use of the channel was expressed during the pendency of the rule making.

3. Singer opposes the substitution of Channel 286C3 for Channel 232A at Nowata. Instead, it requests the substitution of Channel 287C2 for Channel 287C3 at Bixby and the modification of Station KJMM's (formerly KRMP-FM) construction permit to specify the higher powered channel. Singer states that the allotment of Channel 287C2 to Bixby would allow Station KJMM to serve an additional 194,026 persons within an area of 3,796 square kilometers. In comparison, it states that the allotment of Channel 286C3 to Nowata will result in an increase of only 32,632 persons within a 2,234 square kilometer area. However, Singer suggests that both upgrades can be accomplished if Station KRIG's license is modified to Channel 285A in this proceeding and then KRIG applies for a co-channel upgrade through the Commission's "one-step" upgrade application procedure.[3] The transmitter sites for the Nowata and Bixby allotments are located approximately 102 kilometers apart while the Commission's Rules stipulate a minimum distance separation of at least 117 kilometers for first adjacent Class C2 and Class C3 allotments. Therefore, the two proposals are mutually exclusive.

4. In order for us to proceed with our analysis of the competing upgrade proposals at Bixby and Nowata, it is necessary to issue an *Order to Show Cause* to Station KRIG why its license should not be modified to specify operation on Channel 285A in lieu of its present Channel 232A. Integrated has expressed its willingness to reimburse KRIG for the reasonable costs incurred in changing its operating channel. This *Order to Show Cause* is necessary because KRIG has withdrawn its agreement to the modification of its license to specify Channel 285A. However, we will not accept any additional counterproposals because an opportunity has already been provided for the filing of such proposals. Further, although this *Order* affords KRIG an opportunity to object to the proposed channel change, it does not afford an additional opportunity to comment on the merits of the proposals set forth in the *Notice of Proposed Rule Making* or the proposal advanced in Singer's counterproposal. *See Angola, Indiana, et al.*, 5 FCC Rcd 2000 (1990).

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[1] Public Notice of the filing of the counterproposals by KYFM and Singer was given on November 18, 1994, Report No. 2041. However, on November 17, 1994, KYFM withdrew its counterproposal (RM-8549) which requested the upgrading of Station KYFM(FM), Bartlesville, Oklahoma, from Channel 261A to either Channel 286C3 or Channel 261C1. In its request for dismissal, KYFM, in compliance with Section 1.420(j) of the Commission's Rules, states that no consideration has been or will be received in exchange for the dismissal of its comments and counterproposal. Therefore, no consideration of its comments and counterproposal will be given and its proposal will be dismissed. Johnson also filed comments and a counterproposal requesting the substitution of Channel 232C2 for Channel 232C3 at Rogers, Arkansas, and the modification of Station KAMO-FM's license accordingly. However, there is no conflict with any of the proposals under consideration herein and thus is not a counterproposal. Rather, Johnson's proposal is contingent upon the migration of Station KRIG from Channel 232A to either Channel 286C3 or Channel 285A. However, we will accept Johnson's pleading as comments in support of the deletion of Channel 232A from Nowata.

[2] Singer's reply comments were accompanied by a "Motion to Accept Late-Filed Reply Comments" because they were filed with the Commission on the day after the reply comment deadline specified in the *Notice*. However, we do not consider these reply comments to be late-filed because of the issuance of the Public Notice on November 18, 1995, announcing the filing of counterproposals in this proceeding. The issuance of a Public Notice announcing the filing of a counterproposal extends the reply comment deadline to coincide with the response time specified in the counterproposal Public Notice. *See Corinth, Hadley and Queensbury, New York*, 2 FCC Rcd 3316 (1987).

[3] *See Amendment of Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993).

5. Channel 285A can be allotted to Nowata in compliance with the Commission's minimum distance separation requirements at Station KRIG's presently licensed transmitter site.[4]

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, KRIG, Inc., licensee of Station KRIG, Nowata, OK, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 285A as proposed herein instead of the present Channel 232A.

7. Pursuant to Section 1.87 of the Commission's Rules, KRIG, Inc., may, not later than **August 31, 1995**, file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on KRIG, Inc. to furnish additional information. If KRIG, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, KRIG, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order to Show Cause* to the licensee of Station KRIG as follows: KRIG, Inc., P.O. Box 877, Bartlesville, OK 74005.

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Makings to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] The coordinates for Channel 285A at Nowata are 36-44-35 North Latitude and 95-45-17 West Longitude.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-316**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8403 |
| Table of Allotments, | RM-8576 |
| FM Broadcast Stations. | |
| (Douglas, Tifton and Unionville Georgia)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 5, 1995; Released: July 17, 1995**

By the Chief, Allocations Branch:

1. At the request of Orchon Media, Inc. ("Orchon"), permittee of Station WKZZ(FM), Channel 223A, Douglas, Georgia, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 154 (1994), proposing the substitution of Channel 223C3 for Channel 223A at Douglas, Georgia, the reallotment of of Channel 223C3 from Douglas to Unionville, Georgia, and the modification of the construction permit for Station WKZZ(FM) to specify Unionville as its community of license. Orchon filed comments and a counterproposal.[2] Tifton Broadcasting Corporation ("TBC"), licensee of Station WTIF(AM), Tifton, Georgia, and WJYF(FM), Nashville, Georgia, and Clyde J. Scott, Jr., D/B/A, EME Communications ("EME") filed comments. In response to the counterproposal Tifton filed reply comments.

2. TBC, in its comments, argues that Unionville is not a "community" for allotment purposes. TBC's President, Ronald Griffin, contends that Unionville does not exist as a separate community, but is actually a part of Tifton, Georgia. TBC argues the mere fact that Unionville is listed in *Rand McNally Commercial Atlas* as a "Census Designated Place" ("CDP") is not conclusive. TBC goes on to state that the Commission must look at the totality of circumstances to determine whether an area qualifies as a "community." TBC asserts that there is no evidence that Unionville has its own business, social and organizational units, citing *Rockport, Texas*, 67 RR 2d 176 (1989). TBC further argues that Unionville does not possess any social, economic or cultural components that are commonly associated with community status. Therefore, TBC contends that Orchon's proposal should be denied.

3. EME also filed comments arguing that Unionville is not a community for allotment purposes. EME asserts that there are no city limit signs to indicate Unionville, nor are there any identification markings of any kind. There are no provisions in the Tifton County telephone book indicating any numbers in Unionville. EME submits letters from the Tifton County Board of Commissioners and the U.S. Postal Service, both indicate that Unionville is a part of Tifton, Georgia.

4. The *Notice* questioned the status of Unionville as a community for allotment purposes, and requested Orchon to present information demonstrating that Unionville has sufficient social, economic, cultural, and governmental indicia to qualify it as a community for allotment purposes. Orchon in its comments and counterproposal states that since Unionville, Georgia, was designated by the U.S. Census as a CDP, it believed that such a listing nevertheless served to demonstrate that Unionville is in fact a "geographic identifiable population grouping." Orchon contends that the Commission has specifically held that being listed as a CDP is enough for allotment purposes, citing *Pierce, et al. Texas*, 8 FCC Rcd 3528, 3530 (1993). Orchon argues that the sheer size of Unionville (population 2, 710) more than qualifies it as a community for allotment purposes. However, Orchon has concluded that new service can best be provided by the reallotment of Channel 223C3 from Douglas, Georgia to Tifton, Georgia, a community whose status is beyond question. Orchon states that the reallotment of Channel 223C3 from Douglas to Tifton would represent a preferred arrangement of allotments consistent with, *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 51 RR 2d 802 (1982).[3] Orchon argues that its proposal would not involve either gain or loss of first full-time aural service, second full-time aural service, or first local service. Thus, the Commission's fourth allotment criteria, "Other public interest matters", govern the merits of this case. In that regard Orchon contends that the areas represented by theoretical coverage of Douglas, Georgia, on Channel 223A and Tifton, Georgia, on Channel 223C3 both currently receive coverage from numerous radio stations during both daytime and nighttime hours. Further, Orchon states that the reallotment of Channel 223C3 from Douglas to Tifton would not result in the loss of Douglas's first or second local service.

5. Orchon states that since Station WKZZ at Douglas, Georgia is an unbuilt station, it does not represent service on which the public has come to rely on, and will not cause any disruption to existing service, citing *Glencoe and LeSueur, Minnesota*, 7 FCC Rcd 7651 (1992); and *Pawley's Island and Atlantic Beach, South Carolina*, 8 FCC Rcd 8657 (1993). Therefore, the Commission need not weigh the loss or disruption of existing service against "theoretical" gains in service. Orchon also contends that there would be no creation of unserved or underserved areas should the Commission adopt its proposal. Orchon submits that it has studied the gain and loss area for Station WKZZ(FM) if Channel 223C3 is substituted for 223A at Douglas, Georgia, and reallotted to Tifton, Georgia. Orchon states that an area of 3,942 square kilometers within a population of 84,204 persons will gain new reception service based on its proposed reallotment, while an area of 1,721 square kilometers within a population of 31,226 persons would theoretically lose "existing" service. Orchon argues that its

[1] The community of Tifton, Georgia, has been added to the caption.

[2] Public Notice of the counterproposal was given on January 18, 1995, Report No. 2052 (RM-8576).

[3] The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight given to priorities (2) and (3)].

proposal represents a net gain of 2,221 square kilometers and 52,978 persons who would receive new service. Orchon states its intention to apply for Channel 223C3 at Tifton, Georgia, if allotted.

6. In its reply comments, Orchon notes that both TBC and EME challenge the status of Unionville as a community for allotment purposes. Orchon states that their concerns have been mooted by its counterproposal requesting the substitution of Channel 223C3 for Channel 223A at Douglas, and the reallotment of Channel 223C3 from Douglas to Tifton.

7. In response to the counterproposal, TBC argues that even though Orchon's new FM station is not yet built and operational, it does not change the fact that Douglas will be losing one of its media voices, if Orchon's proposal is approved. TBC contends that Orchon would not be able to provide city grade coverage to the entire community of Douglas from its proposed tower site northeast of Tifton as required by §73.315 of the Commission's rules. Therefore, TBC argues that Orchon is "community shopping," seeking to find a city or town to designate as its station's community of license, while at the same time satisfying the Commission's city grade coverage rule. TBC further contends that Orchon is not serious about serving the citizens of Tifton and that it is merely seeking a community that will fit its stations' engineering needs. Tifton further argues that Orchon has not shown that it is precluded from upgrading its FM station on Channel 223A at Douglas. TBC also argues that in *Modification of FM and TV Authorizations (New Community of License)*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990), the Commission concluded that its previous policy of permitting a station to change its community of license precluded beneficial upgrades. Therefore, they modified the policy to protect licensees seeking to change their community of license, from outside expressions of interest, thereby licensees would be allowed to propose upgrades that would not otherwise be available. Finally, TBC states that Orchon has failed to show why the reallotment of Channel 223C3 from Douglas, Georgia, to Unionville, Georgia is necessary.

8. We believe that the substitution of Channel 223C3 for Channel 223A at Douglas, Georgia, the reallotment of Channel 223C3 from Douglas to Tifton, Georgia, and the modification of Station WKZZ(FM)'s construction permit to specify Tifton as its community of license is in the public interest. In examining a change of community of license proposal, we must determine whether the proposal would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures. *See Modification of FM and TV Authorizations to Specify a New Community of License, ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) *("Change of Community MO&O")*. In determining whether a proposed reallotment represents a preferential arrangement of allotments, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities, *see supra*. In making this determination, we find that Tifton (population 14,215) would receive its "first competitive local FM service", which falls under priority four, and Douglas (population 10,464) will continue to be served by full-time stations WDMG(AM), WDMG(FM), and WOKA(FM), and falls under priority four, "other public interest matters." We note that the proposed reallotment of Channel 223C3 to Tifton would result in a net gain of service to 50,578 persons within an area of 2,243 square kilometers (867 square miles), while the removal of Station WKZZ(FM) from Douglas will create a loss area to 29,537 persons within an area of 1,650 square kilometers (637 square miles). The analysis also shows that both the loss and gain areas for Douglas will continue to receive at least five full-time reception services, and therefore, are considered to be well-served areas. We find that the change in community of license will not cause any disruption to existing service since Station WKZZ(FM) has never been on the air. Finally, neither community is located within or near any Urbanized Area.

## TECHNICAL SUMMARY

9. Channel 223C3 can be allotted to Tifton in compliance with the Commission's minimum distance separation requirements at petitioner's specified transmitter site, with a site restriction of 17.1 kilometers (10.7 miles) northeast of the community.[4] In accordance with Section 1.420(i) of the Commission's Rules, we will modify the construction permit for Station WKZZ(FM) to specify Channel 223C3, Tifton, Georgia, as its community of license.

10. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 31, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

| City | Channel No. |
|---|---|
| Douglas, Georgia, | 258C1,[5] 294C1 |
| Tifton, Georgia | 223C3, 262C |

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WKZZ(FM), Channel 223A, Douglas, Georgia, IS MODIFIED, to specify operation on Channel 223C3, Tifton, Georgia, in lieu of Channel 223A, Douglas, Georgia, as its community license, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

[4] The coordinates for Channel 223C3 at Tifton are North Latitude 31-31-05 and West Longitude 83-20-43.

[5] On December 14, 1994, at the request of WDMG, Inc., licensee of Station WDMG(FM) that station was downgraded from Channel 258C to Channel 258C1 by application (BPH-940902ID).

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

12. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Orchon Media, Inc., is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade and change of community.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-221**

In the Matter of

Amendment of Section 73.202(b), RM-8071
Table of Allotments,
FM Broadcast Stations.
(Quincy and Susanville,
California)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 5, 1995** **Released: July 17, 1995**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 6370 (1992), issued in response to a petition for rule making filed on behalf of Olympic Broadcasters, Inc. ("petitioner"), licensee of Station KQNC(FM), Quincy, California, proposing the reallotment of Channel 271A to Susanville, California, as a Class C2 channel, and modification of its license accordingly.[1] Petitioner filed comments reaffirming its intention to apply for Channel 271C2 at Susanville. Opposing comments were filed by Sierra Broadcasting Corporation ("Sierra")[2] and by Ralph E. Wittick ("Wittick").[3] Petitioner filed a motion for extension of time to file reply comments and reply comments.[4]

2. As stated in the *Notice*, petitioner seeks the substitution of Channel 271C2 for Channel 271A and its reallotment from Quincy (population 2,700 persons) to Susanville (population 7,279 persons),[5] and modification of its license for Station KQNC(FM) accordingly. In support of its proposal petitioner advises that the requested reallotment would provide an additional competitive transmission service to Susanville,[6] and would not deprive Quincy of local service.[7]

3. Wittick asserts that the petitioner's reallotment proposal would not serve the public interest requirements of Section 307(b) of the Communications Act of 1934 since it would not result in an equitable distribution of facilities between Quincy and Susanville. In this regard, Wittick disputes petitioner's contention that because Susanville's population is 2.7 times larger than Quincy's, yet the former community has less local service, the current distribution of allotments between the two communities is inefficient and inequitable. Wittick states that the 1990 U.S. Census attributes the Quincy-East Quincy census area with a population of 4,271. Additionally, Wittick remarks that a fewhsmall areas of population adjacent to Quincy raises its total population to approximately 4,500 persons. Therefore, Wittick asserts that the total population of the two communities is not as different as petitioner claims.

4. Wittick remarks that even if the petitioner's proposal is determined to be technically preferable pursuant to Section 307(b) of the Communications Act, the petitioner must demonstrate that the discontinuance of present service at Quincy does not outweigh the theoretical gains from the reallotment to Susanville. In this regard, Wittick states that the Commission has stressed that the provisions of Section 1.420(i) may not be used by a licensee merely to abandon a smaller market in favor of a larger one.[8] Wittick adds that since Susanville is currently served by two licensed stations and has been authorized a third local service, its population is presently well served by local broadcast outlets. Conversely, Wittick claims that as Quincy is presently served locally by only two licensed stations, the petitioner's proposal, if granted, would result in a 50% reduction of existing service to approximately 5,000 residents, leaving that population's choice to a single AM broadcast station. Since the public has a legitimate expectation of continued service, Wittick remarks that the petitioner's proposal fails to meet the Commission's mandate to justify the disruption of Quincy's present service or that

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[1] The *Notice* herein advised that although petitioner is licensed on Channel 271C2 at Quincy, it was downgraded to Channel 271A to accommodate the modification of its commonly owned Station KSSJ(FM) (formerly KFIA-FM), Shingle Springs, California. *See* 7 FCC Rcd 3133 (1992). Petitioner has been issued a construction permit on Channel 271A at Quincy. See File No. BPH-920730IG.

[2] Sierra is the licensee of Stations KSUE(AM) and KJDX(FM) (formerly KSUE-FM), Susanville.

[3] Wittick is the licensee of Station KPCO(AM), Quincy.

[4] Although petitioner's request for an extension of time was unopposed, it was not filed seven days in advance of the filing deadline for the receipt of reply comments in this proceeding, as required by Section 1.46(b) of the Commission's Rules. Petitioner advised that the additional time was necessary to analyze the gain and loss areas which would result from the proposed reallotment of Station KQNC(FM) from Quincy to Susanville. The staff did not act on the extension request. In view of the fact that Sierra and Wittick did not object to the petitioner's extension request, we believe that the acceptance of the reply comments will serve the public interest since they will provide a more complete record to facilitate the Commission in the resolution of this proceeding. *See* Section 1.425 of the Commission's Rules.

[5] Population figures are taken from the 1990 U.S. Census.

[6] Susanville is served locally by fulltime Station KSUE(AM) and KJDX(FM), Channel 227C. Although a construction permit issued for Station KKLC(FM) to operate on Channel 242C3 in Susanville (File No. BPH-910204ME) was cancelled, a petition for reconsideration of that action has been filed.

[7] Besides Station KQNC(FM), Quincy is served locally by fulltime Station KPCO(AM). Additionally, construction permits have been issued at Quincy for Station KNLF(FM) to operate on Channel 276A (File No. BMPH-920219JI), and for Station KSPY(FM) to operate on Channel 262C3 (File No. BMPH-940425IB. Station KNLF(FM) has been modified to specify operation on Channel 240A. *See* 7 FCC Rcd 1318 (1992).

[8] Petitioner notes that this policy was applied in *Eatonton and Sandy Springs, Georgia and Anniston and Lineville, Alabama* (*"Anniston"*), 70 RR 2d 182 (1992). However, it is inappropriate to rely on the rationale employed in *Anniston* in the context of this proceeding as an application for review of that decision is pending.

the expected gain from the reallotment outweighs the loss of service to Quincy's residents.[9] Thus, Wittick urges denial of the petitioner's proposal.

5. Sierra alleges that petitioner's proposal constitutes not only an upgrade and reallocation, but an abandonment of the sole FM operation at Quincy in favor of a new market and commercial center. Sierra asserts that the presence of two uncommitted construction permits in Quincy cannot justify the loss of service to that small, remote community. Furthermore, Sierra remarks that a Class A station at the smaller community of Quincy, which is located in amountainous region, could not remain economically viable unless it could expand its coverage area to reach additional listeners. Yet, Sierra claims that petitioner purposely downgraded Station KQNC(FM) to Class A status at Quincy to accomplish an upgrade of a commonly owned station in Shingle Springs, California. Sierra maintains that if petitioner's proposal is granted, it would result in a disproportionate arrangement of allotments, as Susanville would have three high powered Class C channels and Quincy would be left with Class A facilities. Sierra comments that petitioner has not attempted to develop Station KQNC(FM) as a local Quincy facility, but rather appears to operate it as a satellite of its Station KTHX(FM), Reno, Nevada.[10] Sierra asserts that petitioner's motive in acquiring Station KQNC(FM) was a catalyst toward Susanville. Thus, Sierra urges denial of the proposal in favor of maintaining operation of a needed service to the smaller remote community of Quincy.

6. In response to the oppositions posed by Wittick and Sierra, petitioner asserts that the basis of each objector's motive is to stifle competition. Petitioner advises that Sierra is the licensee of an AM-FM combination in Susanville. Wittick is the licensee of fulltime Station KPCO(AM), Quincy. Further, petitioner advises that Wittick is also the licensee of Station KCMT(FM), Channel 255C, Chester, California, which is located approximately 25 miles west of Susanville. Petitioner claims that although Wittick and Sierra couch their oppositions on public interest grounds, the underlying basis of their objections stem from marketplace considerations relating to their own broadcast interests.

7. As to Sierra's allegation that a lower powered, Class A facility in Quincy could not remain economically viable unless it is able to increase its facility to a higher class channel to expand its coverage area, petitioner comments that any upgrade of Station KQNC(FM) requires a change in its transmitter location and city of license to comply with the minimum distance separation requirements of Section 73.207(b) and the principal city coverage requirements of 73.315 of the Commission's Rules. Moreover, petitioner notes that the previous downgrade of Station KQNC(FM) is not relevant to this proceeding. Rather, the only issue present here is whether the public interest would be better served by the reallotment proposal.

8. In support of its proposal, petitioner states that it is not attempting to relocate from an underserved rural area to a well-served urban area. Both Quincy (population 2,700) and Susanville (population 7,279) are small markets. Petitioner comments that the fact that Susanville is the larger in terms of population is a difference of degree only, and not of substance. Petitioner claims it is not attempting to abandon Quincy in favor of Susanville. Rather, it states it is driven by a desire to regain the formerly licensed Class C2 facilities of Station KQNC(FM) via the instant rule making proceeding.

9. In further support of its proposal, petitioner remarks that although Quincy would be left with Station KPCO(AM) as its sole local transmission service until Station KSPY(FM), Channel 263C3 and Station KNLF(FM), Channel 276A commence operations, the community would not be deprived of local transmission service as the Commission considers AM and FM stations to be joint components of a single aural medium. *See* 5 FCC Rcd 7094, 7097 (1990). Moreover, petitioner advises that in addition to Station KPCO(AM), Quincy receives other reception services, such as, but not limited to, Station KCMT(FM), Chester, California.

10. Petitioner comments that as Susanville's population is 2.7 times larger than Quincy, yet it has only three local transmission services (one of which is not operative), whereas Quincy has four local transmission services (two of which are not operative), its proposal would result in a preferential arrangement of allotments by providing the larger community of Susanville with its fourth local transmission service, while three local transmission services would remain at the smaller community. Petitioner concludes that adoption of its proposal would enable Station KQNC(FM) to regain its formerly licensed Class C2 status, thereby maximizing use of the frequency, while enabling it to provide an improved reception service to a larger audience at Susanville.

11. Based upon a careful review of the information presented in this proceeding, we believe the public interest would be served by reallotting Channel 271A from Quincy to Susanville as a Class C2 channel, since it will result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures. *See Modification of FM and TV Authorizations to Specify a New Community of License* (*"Change of Community R&O"*), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) (*"Change of Community MO&O"*). Applying those procedures, we compare the existing arrangement of allotments with the proposal using our FM allotment priorities.[11]

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[9] Wittick cites to several cases to support its assertion concerning the burden placed on applicants to demonstrate the public interest justification relative to the loss of a local service designed to meet a community's particular needs. However, the authorities cited are inappropriate in the context of this proceeding as they relate to comparative hearing issues, or to gain and loss comparisons pursuant to previous decisional law which the Commission has since rejected. *See* elimination of the "Berwick Doctrine" and the De Facto Reallocation Policy, 93 FCC 2d 436 (1983).

[10] According to the Commission's records, Station KTHX-FM, Carson City, Nevada, is now licensed to Bridge Capital Investors, II.

[11] The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

12. In making our comparison, the first three priorities are not applicable here. No white or grey areas are involved[12] (priorities (1) and (2)), and each community has local transmission services (priority (3)). Therefore, priority (4) "other public interest matters"[13] applies in this instance. The reallotment would not remove the sole local transmission service from Quincy as fulltime Station KPCO(AM) will remain in the community.[14] Susanville, which is not in an urbanized area, will receive its fourth local transmission service.[15] Additionally, the reallotment will enable Station KQNC(FM) to upgrade its facilities, and provide reception service to 14,982 persons residing in Plumas and Lassen Counties in an area comprising 5,716 square kilometers. The gain area will include the provision of a fifth service to 2,734 persons and a fourth service to 1,306 persons. Our engineering analysis also reveals that the removal of Station KQNC(FM) from Quincy will create a reception service loss to 6,379 persons in an area of 1,666 square kilometers. While we carefully evaluate any proposal that would result in the loss of existing reception service, the population within the loss area will continue to receive service from five or more fulltime aural services. Therefore, in accordance with the provisions of Section 1.420(g) and (i) of the Commission's Rules, we will modify the authorization for Station KQNC(FM) to specify operation on Channel 271C2 in lieu of its present authorization on Channel 271A at Quincy.

13. Channel 271C2 can be allotted to Susanville at the petitioner's specified site located 8.2 kilometers (5.1 miles) northeast of the community at coordinates 40-27-13 and 120-34-14.

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 31, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

| City | Channel No. |
|---|---|
| Quincy, California | 240A, 262C3 |
| Susanville, California | 227C, 242C3, 271C2 |

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Olympic Broadcasters, Inc. for Station KQNC(FM) (File No. BLH-940309KA), IS MODIFIED to specify operation on Channel 271C2 at Susanville, California, in lieu of Channel 271A at Quincy, California, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

16. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Olympic Broadcasters, Inc., licensee of Station KQNC(FM), is required to submit a rule making fee, in addition to the fee required for the applications to effect the change in community of license and upgrade at Susanville, California.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[12] A white area refers to a geographical area in which there are no full-time aural reception services. A gray area is one that is served by one full-time aural reception service only.

[13] Pursuant to this category, factors such as population and area to be served, the present level of services available, and other considerations are evaluated to determine which community has the greater need for service.

[14] Additionally, construction permits have been issued at Quincy for Station KSPY(FM), Channel 262C3 (File No. BMPH-940425IB), and for Station KNLF(FM), Channel 276A (File No. BMPH-920219JI). As indicated earlier, Station KNLF(FM) has been modified to specify operation on Channel 240A. *See* 7 FCC Rcd 1318 (1992).

[15] The construction permit issued for Station KKLC(FM) to operate on Channel 242C3 at Susanville (File No. BPH-910204ME) was cancelled May 19, 1994. A petition for reconsideration of that action is pending.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-299**

In the Matter of

Amendment of Section 73.606(b), RM-8049
Table of Allotments,
TV Broadcast Stations.
(Appleton, New London and Suring,
Wisconsin)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 7, 1995; Released: July 17, 1995**

By the Chief, Allocations Branch:

1. At the request of Wisconsin Voice of Christian Youth, Inc. ("Wisconsin Voice"), licensee of television Station WSCO, Channel 14-, Suring, Wisconsin, the Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 8 FCC Rcd 181 (1993), proposing reallotment of Channel 14- from Suring to either Appleton or New London, Wisconsin, and modification of the Station WSCO license to specify a new community of license.[1] Wisconsin Voice filed comments and reply comments. Aries Telecommunications Corporation ("Aries") filed comments and reply comments. Finally, Wisconsin Voice filed a response and Aries filed a reply to the response.[2] For the reasons discussed below, we deny the proposed reallotment to either Appleton or New London.

## BACKGROUND

2. On July 12, 1989, Wisconsin Voice filed a Petition for Rule Making proposing reallotment of Channel 14- from Suring to Appleton, Wisconsin, and modification of its license to specify Appleton as the community of license. On July 28, 1989, this Petition for Rule Making was returned as unacceptable for consideration. The reasons for that action were that the proposed reallotment would not result in a preferential arrangement of allotments as required by *Modification of FM and TV Authorizations to Specify a New Community of License*, (*"Community of License"*), 4 FCC Rcd 4870 (1989); *recon.*, 5 FCC Rcd 7094 (1990), and that the proposal would contravene the Commission Order freezing new applications and allotments within the minimum co-channel distance of 30 major markets. *See Order, In the Matter of Advanced Television Service* (*"Freeze Order"*), 52 Fed. Reg. 28346, published July 29, 1987. Wisconsin Voice filed a Petition for Reconsideration and Reinstatement directed to that action. Aries filed an Opposition to the Petition for Reconsideration and Wisconsin Voice filed a Reply to that Opposition. In its Reply, Wisconsin Voice stated that in the event that its proposed reallotment to Appleton should ultimately be found unacceptable, it would be "fully prepared" to accept a reallotment to New London. Thereafter, we adopted the *Notice* proposing reallotment of Channel 14- to either Appleton or New London, Wisconsin, and requested that Wisconsin Voice to specify which reallotment proposal it wishes to pursue. In response, Wisconsin Voice specified New London.

3. In support of its proposed reallotment to New London, Wisconsin Voice first reiterates its earlier argument that Suring, with a population of 626 persons according to the 1990 U.S. Census, "has proven itself incapable of supporting a full service television station," has been unable "to generate sufficient income to meet operating expenses," and is currently off the air. According to Wisconsin Voice, reallotment to New London, with a population of 6,658 persons, is the "most appropriate means to ensure the long-term economic viability" of the facility. In this regard, the proposed reallotment would result in service to 13,640 square kilometers with a population of 670,167 persons, compared to the existing service area of 8,026 square kilometers with a population of 101,155 persons. In comparing the existing allotment in Suring to the proposed allotment in New London, Wisconsin Voice notes that its proposal would result in a first local service to a larger community and therefore would result in a preferential arrangement of allotment as required by *Community of License*. Finally, Wisconsin Voice contends that the *Freeze Order* does not apply to its proposal, and, in any event, waiver would be appropriate in this instance.

## DISCUSSION

4. We deny the proposed reallotment. At the outset, we note that this proposal contravenes the *Freeze Order*. The *Freeze Order* states, in pertinent part, as follows:

> Accordingly, we will temporarily freeze the TV Table of Allotments in certain areas. No petitions to amend the table will be accepted for those areas. Further, construction permit applications for vacant television allotment in those areas will not be accepted. This freeze, however, will not apply to changes requested by existing stations.

In making this determination, we realize that the existing Suring allotment is already within the Milwaukee, Wisconsin freeze area and that the proposed reallotment to New London is closer to the Milwaukee reference point.[3] A reallotment from Suring to New London would be a

[1] A television station with a "plus" or "minus" offset is required to operate with its carrier frequency 10 kHz above or below the normal frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules.

[2] Both of these submissions were accompanied by motions to accept late-filed pleadings. In view of the fact that the untimely pleadings have not delayed resolution of this proceeding and consideration of these pleadings will enable us to resolve this proceeding on the basis of a more complete record, we will consider both pleadings.

[3] The affected freeze areas are the areas circumscribed by the minimum co-channel separation distances specified in Section

change in the TV Table of Allotments and is, therefore, within the specific language of the *Freeze Order*. The exclusion with respect to existing stations pertains to construction permit applications such as transmitter relocations, power increases or increases in antenna height. The purpose of the *Freeze Order* was to preserve sufficient broadcast spectrum to insure reasonable options relating to a conversion to a digital television service. As such, the *Freeze Order* does not permit Wisconsin Voice to reallot Channel 14-, located 248.6 kilometers (154 miles) from the Milwaukee reference point, to New London, located 220 kilometers (137 miles) from the Milwaukee reference point.[4]

5. We do not believe that waiver of the *Freeze Order* is warranted. The fact that the Suring Channel 14- allotment is already within the Milwaukee freeze area has the potential to restrict a conversion to digital television system. This fact provides no basis, whatsoever, to justify reallotment of the channel, with the potential to operate Channel 14- at maximum facilities, 28.6 kilometers (16.5 miles) closer to Milwaukee. *C.f. Nacogdoches, Texas*, 4 FCC Rcd 7815 (1989). In this connection, Wisconsin Voice has provided no basis to support its conclusion that this reallotment would have "only a limited impact on spectrum availability for advanced television." At this juncture, we continue to believe that the public interest requires us to preserve spectrum and options in the Milwaukee freeze area.

6. The economic argument advanced by Wisconsin Voice does not warrant reallotment of Channel 14- to New London or waiver of the *Freeze Order*. There was no provision in *Community of License* to have allegations of economic hardship, even if supported, considered in determining whether a proposed reallotment would result in a preferential arrangement of allotments in furtherance of Section 307(b) of the Communications Act.[5] *See LaGrange and Rollingwood, Texas*, 10 FCC Rcd 3337 (1995). In a similar vein, there is no basis to consider such issues in the context of either the *Freeze Order* or the implementation of a digital television service. This is consistent with the Commission determination that such issues are not relevant in either the licensing or allotment context. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988).[6]

7. Accordingly, IT IS ORDERED, That the Petition for Rule Making filed by Wisconsin Voice of Christian Youth, Inc. to reallot Channel 14- from Suring to New London, Wisconsin, IS DENIED.

8. IT IS FURTHER ORDERED, That the Petition for Reconsideration and Reinstatement filed by Wisconsin Voice of Christian Youth, Inc., IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

73.610(b) of the Rules, from the reference points given in Section 76.53 for the cities listed in the Appendix to the *Freeze Order*.

[4] In this case, the freeze area extends 248.6 kilometers (154.5 miles) from the Milwaukee reference point.

[5] Section 307(b) of the Act requires the Commission to make a "fair, efficient, and equitable distribution of radio facilities."

[6] In regard to issues that are relevant in a allotment context, our engineering review has determined that a reallotment of Channel 14- to New London and relocation of the Station WSCO transmitter site would result in a service loss to an area of 3,354 square kilometers with a population of 23,737 persons. This would create a gray area (one television service) of 312 square kilometers with a population of 1,265 persons.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-8**

In the Matter of

Amendment of Section 73.202(b) RM-8563
Table of Allotments,
FM Broadcast Stations.
(Tompkinsville, Kentucky)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 7, 1995; Released: July 17, 1995**

By the Chief, Allocations Branch:

1. At the request of Falcon Broadcasters ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making,* 10 FCC Rcd 867 (1995), proposing the allotment of Channel 274A at Tompkinsville, Kentucky, as the community's second local FM transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Petitioner also filed a statement in lieu of reply comments. No other comments were received.

2. We believe the public interest would be served by allotting Channel 274A at Tompkinsville, since it would provide the community with an additional FM transmission service. An engineering analysis has determined that Channel 274A can be allotted to Tompkinsville in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.5 kilometers (5.9 miles) southeast to avoid short-spacings to vacant Channel 273C3, Crossville, Tennessee, Station WYCQ(FM), Channel 275C1, Shelbyville, Tennessee, and Station WTKY(FM), Channel 221A, Tompkinsville, Kentucky.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 31, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Tompkinsville, Kentucky | 221A, 274A |

4. The window period for filing applications will open on **August 31, 1995**, and will close on **October 2, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 274A at Tompkinsville are North Latitude 36-39-55 and West Longitude 85-35-51.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-34**

In the Matter of

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| Amendment of Section 73.202(b) | RM-8600 |
| Table of Allotments, | RM-8654 |
| FM Broadcast Stations. | |
| (Rapid City and Lead, South Dakota)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 7, 1995; Released: July 17, 1995**

By the Chief, Allocations Branch:

1. At the request of Conway Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 3322 (1995), proposing the allotment of Channel 222C at Rapid City, South Dakota, as the community's seventh local FM transmission service (RM-8600). Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Comments and a counterproposal were filed by Associated Investors, Inc. ("AII"), proposing the allotment of Channel 222C at Lead, South Dakota, as the community's first local aural transmission service (RM-8654).[2] Petitioner and AII filed reply comments. Petitioner also filed a letter requesting that its reply comments be considered in response to AII's counterproposal.

2. In support of its counterproposal, AII states that Lead is an incorporated community with a population of 3,632 persons,[3] and has an elected government consisting of a mayor and four commissioners. Lead also has a city hall, police department, fire department, library, post office, zip code, an elementary school, and a regional high school. In addition, Lead has hotels, inns, clubs and civic organizations. AII avers that the Commission has long recognized the importance of providing a community with its first local aural transmission service, citing *Atchison et al., Kansas* 7 FCC Rcd 4645 (1992); *Alegria I, Inc.*, 61 RR 2d 136 (1986), *recon. denied*, 2 FCC Rcd 1762 (1987); *Caldwell Broadcasting Corp.*, 100 FCC 2d 115 (1985), *rev. denied*, 104 FCC 2d 438 (1986); and *Alessandro Broadcasting Corp.*, 99 FCC 2d 1 (1984), *rev. denied*, FCC 84-334 (rel. June 28, 1985). Therefore, pursuant to the FM allotment priorities, AII asserts that a first local aural transmission service at Lead is preferred over a thirteenth local transmission service at Rapid City. *See* n.4, *infra*. AII states that Rapid City already has six FM stations, four AM stations and two noncommercial educational stations. AII urges that Channel 222C be allotted at Lead in lieu of Rapid City, South Dakota, and AII states its intention to apply for the channel.

3. In its reply comments, petitioner proposes an alternative counterproposal recommending that Channel 277C be allotted at Lead in lieu of Channel 222C, in order to resolve the conflict. To accommodate the allotment at Lead, petitioner also proposes the substitution of Channel 252A for vacant and unapplied for Channel 276A at Sundance, Wyoming, thereby accommodating both requests for the allotment of Class C channels at Rapid City and Lead, South Dakota. In view of its alternative proposal, petitioner suggests that the two proposals be severed to avoid complication and unnecessary delay in the implementation of an additional service at Rapid City. Petitioner urges that the Commission allot Channel 222C at Rapid City and allot Channel 277C at Lead.

4. In response to petitioner's recommendation that alternate Channel 277C be allotted at Lead, AII argues that petitioner's counterproposal should be rejected because Commission precedent is clear that the introduction of the community of Sundance, Wyoming, which was not part of the initial proposal or counterproposal, constitutes an untimely filed counterproposal and cannot be accepted and considered, citing 47 C.F.R. Section 1.420(d); *Ashland, California Rolla and Monroe City, Missouri*, 8 FCC Rcd 1799 (1993), *modified on recon. on other grounds*, 9 FCC Rcd 2306 (1994); *Grenada, Artesia and Okolona, Mississippi*, 7 FCC Rcd 4838 (1992).[4] AII reiterates its earlier argument that under FM allotment priorities a first local transmission service at Lead should be preferred over a thirteenth local service at Rapid City. Accordingly, AII reaffirms its intention to apply for Channel 222C if allotted to Lead in lieu of Rapid City, South Dakota.

5. After careful consideration of the information before us, we believe that each of the communities is deserving of a new Class C channel. Conflicting proposals are comparatively considered under the guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).[5] However, because an alternate Class C channel has been found for the counterproposal at Lead, South Dakota, such a comparison is no longer necessary. We believe the public interest would best be served by allotting Channel 222C at Rapid City, South Dakota, as its seventh local FM transmission service, and Channel 232C[6] at Lead, South Dakota, as its first local aural transmission service. An engineering analysis has determined that Channel 222C can be allotted at Rapid City in compliance with the Commission's minimum distance separation requirements at city reference coordinates.[7] Additionally, Channel 232C can be allotted to Lead in compliance with the Commission's minimum distance separation requirements with a site re-

[1] The community of Lead, South Dakota, has been added to the caption.

[2] Public Notice was given to the counterproposal on June 2, 1995, Report No. 2075

[3] Population figure taken from the 1990 U.S. Census.

[4] All claims that since petitioner's counterproposal must be rejected, the Commission must likewise render its suggestion of severance as moot.

[5] The FM allotment priorities are: 1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given on priorities (2) and (3).]

[6] We note that the Commission may allot an alternate channel in order to resolve conflicts between proposals. *See Notice, Appendix* 3(c); *see also Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990).

[7] The coordinates for Channel 222C at Rapid City are North Latitude 44-04-50 and West Longitude 103-13-50.

striction of 51.7 kilometers (32.2 miles) northwest to avoid a short-spacing to Station KKMK(FM), Channel 230C1, Rapid City, South Dakota.[8]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 31, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

| City | Channel |
|---|---|
| Rapid City, South Dakota | 222C, 230C1, 250C1, 254C1, 262C1, 281C1, 292C |
| Lead, South Dakota | 232C |

7. The window period for filing applications for Channel 222C at Rapid City, South Dakota, and for Channel 232C at Lead, South Dakota, will open on **August 31, 1995**, and close on **October 2, 1995**.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[8] The coordinates for Channel 232C at Lead are North Latitude 44-38-57 and West Longitude 104-15-47.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-279**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8368 |
| Table of Allotments, | RM-8385 |
| FM Broadcast Stations. | |
| (Cal-Nev-Ari, Boulder City and Las Vegas, Nevada)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 10, 1995; Released: July 17, 1995**

By the Chief, Allocations Branch:

1. At the request of Richard W. Myers ("Myers"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7985 (1993), proposing the allotment of Channel 285A to Cal-Nev-Ari, Nevada, as its first local aural transmission service. Comments were filed by the petitioner reiterating his intention to apply for the channel, if allotted. Rock "N" Roll, Inc. ("RNR") filed a petition for rule making requesting the modification of Boulder City, Nevada, Station KRRI's license to specify Channel 286C2, rather that its present Channel 288C2, and the modification of Las Vegas Station KRBO's license to specify Channel 289C2 rather than its present Channel 286C2.[2] Reply comments were filed by Myers, RNR and Patmor Broadcasting Group, Ltd. ("Patmor"), licensee of Station KRBO.[3]

2. RNR, licensee of Station KRRI, Channel 288C2, Boulder City, states that it is currently receiving interference from second-adjacent Station KRBO, Channel 286C2, Las Vegas, Nevada.[4] It states that this interference occurs within its 1 mV/m as well as its 3.16 mV/m contour. RNR believes that this interference is exacerbated by the fact that the two stations are separated by only 400 kHz and believes that increasing the separation to 600 kHz may reduce or even eliminate the interference. RNR states that both channels can be allotted to their respective communities in compliance with the Commission's mileage separation requirements at each station's present transmitter site. Finally, stating that it is KRBO's responsibility to resolve the interference problem, it states that Station KRBO should reimburse RNR for the reasonable and prudent costs it will incur in making this frequency change.

3. In his petition for rule making, Myers provided information to show that Cal-Nev-Ari qualifies as a community for allotment purposes even though it is not listed in the U.S. Census or incorporated. However, the information provided was found to be insufficient to tentatively conclude that Cal-Nev-Ari is a community for allotment purposes. Therefore, the *Notice* requested that Myers provide specific information as to the social, economic, cultural and governmental indicia to support a finding that Cal-Nev-Ari is a community for allotment purposes.

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[1] The communities of Boulder City and Las Vegas have been added to the caption.

[2] RNR did not file its petition for rule making as a counterproposal in this proceeding. However, RNR's petition is timely filed to be considered as such and the requests are mutually exclusive. Boulder City and Cal-Nev-Ari are located approximately 79 kilometers apart while the Commissions rules specify a minimum distance separation of 106 kilometers for first adjacent Class A and Class C2 allotments. Therefore, in compliance with Commission policy, we have accepted RNR's petition as a counterproposal herein. Public Notice of the filing of the counterproposal was given on January 11, 1994, Report No. 1996.

[3] After the record closed, Myers filed a "Petition for Leave to File" and "Supplemental Reply Comments" which RNR opposed. Myers objects to the fact that RNR did not file initial comments responsive to Myers' proposal but rather submitted its opposition as reply comments in response to the Commission's Public Notice accepting RNR's petition as a counterproposal herein. Myers argues that RNR's reply comments should be struck because he has effectively been precluded from responding to the issues raised in RNR's opposition. We will not strike RNR's reply comments or accept Myers' Supplemental Reply Comments. First, RNR filed its petition for rule making after adoption of the *Notice* in Cal-Nev-Ari but prior to its release to the public. Therefore, RNR had no official notification that a conflicting petition had been filed with the Commission until the issuance of the Public Notice accepting RNR's petition as a counterproposal herein. Therefore, RNR could not be expected to comment on Myers' proposal until responses were due in response to the counterproposal Public Notice. Further, although generally reply comments are for the purpose of responding to issues raised in initial comments, the Commission has previously stated:

> In issuing a Notice of Proposed Rule Making, the Commission generally provides a 15 day period for parties to file replies to initial comments. However, the Commission is aware that when a counterproposal is filed, the time between the announcement of the filing of counterproposal and the reply comment date may be less than 15 days. Thus, the Commission routinely extends the reply comment period to allow all interested parties adequate time in which to respond to the counterproposal. The Commission does not limit these responsive pleadings to parties other than the counterproponent nor the scope of the responses. Rather, it simply extends the filing period to allow all parties 15 days in which to file responsive pleadings.

*See* 2 FCC Rcd 3316 (1987). We also deny Myers' Motion to include Senator Reid's letter in the record. Senator Reid's letter was received at the Commission on January 6, 1994, after the date for filing initial comments but timely for consideration as a reply comments. However, because the letter was not served on the counterproponent, it constitutes a prohibited *ex parte* filing and cannot be considered herein.

[4] RNR states that on October 29, 1993, it reported this interference to the Commission, requesting that the Commission order Station KRBO to take whatever steps might be necessary to eliminate this interference. By letter of March 24, 1994 (1800B3-DEB), the Audio Services Division, under delegated authority, denied RNR's informal objection and granted Station KRBO's license application.

4. In comments, Myers contends that the Commission's reliance on inclusion in the U.S. Census and incorporation in determining community status discriminates against rural areas in the western states where communities are just starting to develop. He states that Cal-Nev-Ari is geographically separate from any other community and thus is not part of any larger community. Further, he submits that a finding that Cal-Nev-Ari is not a community would "relegate its residents to living 'nowhere.'" In reviewing past cases, Myers states that the following elements appear to be important in determining community status: (1) a separate postmark; (2) receipts from local businesses that state the name of the community; (3) evidence that businesses are identified with and serve the community in question, not some other community or larger area; (4) listing in the Rand McNally Atlas and (5) testimony of local residents that they "function and conceive of themselves as residents of a community around which their interests coalesce."

5. Myers states that the petition noted the fact that Cal-Nev-Ari has its own post office and zip code and has local businesses that are identified with and serve Cal-Nev-Ari and not some other community or larger area, namely the Cal-Nev-Ari Casino. To provide the testimony of local residents, Myers appends a report detailing the findings of two sociologists who interviewed the residents of Cal-Nev-Ari to determine whether they function as a community. Myers claims that the report clearly demonstrates that the residents of Cal-Nev-Ari think of themselves as residents of a community.

6. Myers opposes RNR's petition to substitute channels at Boulder City and Las Vegas. He states that RNR seeks to substitute a third-adjacent channel for a second-adjacent channel in order to reduce or eliminate interference to Station KRRI's signal. Myers notes that the Boulder City and Las Vegas stations meet the required mileage separation requirements and thus receive all of the signal protection to which they are entitled. Finally, Myers submits that RNR's proposal does not provide for any new local transmission service or any increase in the coverage of an existing station. Therefore, RNR's proposal does not serve as high an allotment priority as the provision of a first local aural transmission service at Cal-Nev-Ari.

7. In reply comments, Myers again states that Cal-Nev-Ari has the requisite attributes to be considered a community for allotment purposes. He provides the U.S. Census Bureau's definition of a Census Designated Place ("CDP"), stating that the Commission relies heavily on such designations in determining community status. Noting that CDP's are limited to places of at least 1,000 population, Myers argues that if the Commission requires CDP status or political incorporation to justify an allotment, it means the Commission has determined that no unincorporated community of less than 1,000 population merits an allotment. He contends that such a "blanket decision would be arbitrary and irrational, and thus unlawful."

8. RNR, in reply comments, states that Myers has failed to provide information which demonstrates that Cal-Nev-Ari has social, economic, cultural or governmental indicia to qualify it as a "community" for allotment purposes. RNR points out that Cal-Nev-Ari has no schools, with the nearest elementary school in Searchlight and the nearest high school in Laughlin. Most people, according to RNR, subscribe to the *Las Vegas Review-Journal* for newspaper information, contending that not only is there no local newspaper, there is no need for a local source of local news. RNR acknowledges that there is a local volunteer fire department but submits that its existence is due to the distance from other fire houses, not as an indication of community status. It also disagrees with Myers' contention that since Cal-Nev-Ari is not part of any other community it must thereby be considered as a separate community worthy of an FM allotment. RNR states that not everyone lives in a community as defined by the Commission, noting that people can and do live in rural areas without being a part of a defined community.

9. RNR states that the report of sociologists Victoria J. Evans and Donald E. Carns ("Evans/Carns") which Myers' appended to his comments, provides a "reasonably accurate" description of Cal-Nev-Ari. As described in the report, RNR states that Cal-Nev-Ari consists of a double row of mobile homes with an airstrip behind them on one side of the road. On the other side is a casino which also houses the post office, a gas station which is closed two days of the week, a laundromat, mobile homes, a motel, a market and RV park and a ranch. RNR goes on to state that it appears that the gas station, laundromat, RV park and market are part of, or affiliated with, the casino rather than separately owned and operated businesses. RNR notes that Cal-Nev-Ari has no churches, no regular social events or social clubs identified with Cal-Nev-Ari. Further, while Myers contends that the casino is the hub of social life in the area "with some residents spend[ing] their days drinking at the bar," RNR argues that community status is not demonstrated by "residents drinking at a bar." RNR goes on to state that Myers has failed to show any cultural cohesiveness in Cal-Nev-Ari. It points out that Myers acknowledges that many of Cal-Nev-Ari's residents stay in the area only as long as their jobs require it. Further, RNR submits that the fact that many of these people reside in recreational vehicles while in Cal-Nev-Ari clearly shows these residents consider themselves only to be visitors to the area, with no desire to make it a permanent residence. RNR also points out that, with the exception of US Route 95 which is maintained by the federal government, all of the area's roads are only dirt paths.

10. Finally, RNR states that even if the Commission were to find that Cal-Nev-Ari is a community for allotment purposes, the public interest would be better served by the substitution of channels at Boulder City and Las Vegas since it would alleviate a "serious" reception problem by an existing station, a problem not anticipated by the Commission when it allotted Channel 286C2 to Las Vegas. RNR disputes Myers' stand that as long as the mileage separation standards are met, no further protection from interference can be obtained. It argues that Station KRRI's listeners, although outside its community of license, are entitled to interference-free reception. To this end, it states that the Commission required a number of FM stations in the Minneapolis-St. Paul area to reduce power due to interference with the reception of other area stations. Finally, RNR again states that Station KRBO should be required to pay all costs associated with the change of channel but, if required by the Commission, states its willingness to pay the reasonable and prudent costs incurred by Station KRBO in changing its channel.

11. Patmor argues that RNR's "extraordinary" request must be denied. It submits that where stations are fully spaced and no new service is provided, there is no reason for the Commission to juggle allotments simply because a licensee believes that it would improve service within its computed service area. Further, although RNR's proposal may increase the spacing between Stations KRRI and

KRBO. Patmor points out that Station KRBO would become closely spaced to Station KRCY(FM), which operates on first adjacent Channel 290C1 at Kingman, Arizona. Patmor questions whether the Commission would then reallot channels if Station KRBO's new signal affected the reception of Station KRCY(FM), assuming a new allotment could be found. Conversely, if Station KRBO found that Station KRCY(FM)'s signal adversely affected reception of its station, could it request a further rule making to again acquire the right to operate on its initial channel? Thus, Patmor states that RNR's proposal could create a "domino" effect in this and other cases, which would then nullify the Commission's reliance on channel spacing, rather than actual levels of interference, in determining channel allotments. Finally, it argues that RNR's request that Patmor bear the cost of modifying both station's operating channel is inconsistent with Commission policy and precedent, citing *Circleville, Ohio*, 8 FCC 2d 159, 9 RR 2d 1579 (1967). Patmor states that RNR's claim that KRBO is to blame for creating interference to KRRI and thus must cure the interference is "fatuous." No station, according to Patmor, is guaranteed interference-free reception throughout its computed service area. It submits that the spacing regulations represent general, statistical probabilities. Thus, it contends that no permittee/licensee may be required to pay for the modification of any station's facilities if interference actually occurs in a given situation. Finally, Patmor submits that if there is any "fault" in this case, it is RNR's refusal to accept that under the Commission's FM allocation policies, distance, terrain, buildings and an adverse electrical environment, which includes the authorized operations of other stations, may affect a listener's ability to receive Station KRRI's signal, regardless of the extent of the theoretical coverage computed by the station.

## DISCUSSION

12. After reviewing the proposals before us, we find that neither proposal can be granted consistent with Commission policy and precedent. First, based upon the showing submitted by Myers, we do not believe that Cal-Nev-Ari is a community for allotment purposes. The Commission's long-standing policy is to require that allotments be made to communities composed of geographically identifiable population groupings. This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. Although the 1995 Edition of the *Rand McNally Commercial Atlas* lists Cal-Nev-Ari with a population of 350 persons, it is neither incorporated nor listed in the U.S. Census. Further, the Commission has stated that mere geographical location is not sufficient to establish "community status." *See Vimville, Mississippi*, 48 FR 5974 (1983), and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991). Contrary to Myers' assertion, FM allotments are not limited to communities which are either incorporated or listed in the U.S. Census. *See Gleneden Beach, Oregon*, 3 FCC Rcd 6464 (1988), *Eagle Nest-Angel Fire, New Mexico*, 3 FCC Rcd 2520 (1988), and *Laughlin, Nevada*, 2 FCC Rcd §6267 (1987). Such a designation only gives rise to the presumption of community status, a presumption which can be rebutted. *See Hannahs Mill and Milledgeville, Georgia*, 7 FCC Rcd 3944 (1992).

13. In this case, we find that Myers has not provided information sufficient to overcome the Commission's initial finding that Cal-Nev-Ari does not meet the qualifications of a community for allotment purposes. Rather, based on the information provided, it appears that Cal-Nev-Ari is an isolated population pocket where residents feel a kinship with one another and provide assistance whenever possible and necessary. For example, we are told that when an emergency occurs, the bartender, through the use of beepers, sends out a signal and whoever shows up first drives the ambulance or fire truck or does whatever is needed. Comments of Richard Myers, Appendix, page 11. While this leads us to believe that there is indeed a general spirit of humanity and cooperation among the residents, it does not rise to the level of a community for allotment purposes. Cal-Nev-Ari has no local government or any direct governmental impact, and no community organizations such as a Chamber of Commerce, Rotary Club or Lions Club. We deem the lack of any civic or social organizations or religious institutions to be significant in determining whether Cal-Nev-Ari has the indicia of a community. Communities demonstrate the fact that residents share common interests by the formation of community-based organizations and religious institutions. *See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments (Semora, North Carolina)*, 5 FCC Rcd 934 (1990). Moreover, the only business is the Cal-Nev-Ari Casino, owned by Ms. Nancy Kidwell, who also owns and operates the coffee shop, mobile home park, RV park, service station, laundromat, market, airport, water and sewer service. In addition, the remaining salable land is owned by Ms. Kidwell. There are no locally maintained roads and police service is provided by Clark County. According to Myers, municipal concerns are decided by the Clark County Commissioners without input from residents of Cal-Nev-Ari, and the only community meetings held in Cal-Nev-Ari concern the running of the volunteer fire department. We note that while the residents of Cal-Nev-Ari built the fire house, both the fire truck and ambulance were provided by County grants.

14. Next, RNR seeks the substitution of channels at Boulder City and Las Vegas and the modification of the licenses of Stations KRRI and KRBO to specify alternate channels in an attempt to resolve interference to the reception of its station. RNR does not dispute that the two stations are properly separated according to the minimum distance separations set forth in Section 73.207 of the Commission's Rules or that Station KRBO is operating with only the powers authorized in its construction permit and license. Nevertheless, it contends that interference occurs that is unacceptable because it occurs within Station KRRI's predicted 60 dBu and 70 dBu contours.

15. Whether or not Station KRRI may be experiencing interference within these contours, the Commission has consistently held that stations are entitled only to that interference protection which accrues from stations operating at properly spaced separations and with authorized powers. Section 73.209 of the Commission's Rules states:

> Permittees and licensees of FM broadcast stations are not protected from any interference which may be caused by the grant of a new station, or of authority to modify the facilities of an existing station, in accordance with the provisions of this subpart. . . The nature and extent of the protection from interference afforded FM broadcast stations operating on Channels 221-300 is limited to that which results when assignments are made in accordance with the rules in this subpart.

*See also Vancouver, Washington; Coos Bay and Corvallis, Oregon*, 4 FCC Rcd 839 (1989). *See also Morehead City, North Carolina*, 50 FR 33546, August 20, 1985, *recon. den.*, 2 FCC Rcd 4146 (1987), *aff'd WITN-TV, Inc. v. FCC*, 849 F.2d 1521 (D.C. Cir. 1988). RNR is correct that the Commission at one time ordered the Minneapolis-St. Paul stations to reduce power to alleviate interference problems. However, the circumstances which led to that decision are not present in this case. The interference being received by the Minneapolis-St. Paul stations was third order intermodulation, that is, one station's signal mixed with a second station's signal which in turn caused interference to a third station. We note that the problem has now been resolved by the stations moving their transmitters to an antenna farm and the stations have ceased reduced-power operation. Here, the interference complained of is caused by contour overlap, not intermodulation, and thus is governed by Section 73.209 of the Commission's rules. The Commission has, in the past, recognized that mileage separation requirements, as opposed to contour protection, sometimes overprotect or underprotect other adjacent channel stations. *See Amendment of Part 73 of the Commission's Rules to Permit Short-spaced FM Station Assignments by Using Directional Antennas*, 4 FCC Rcd 1681, 1685 (1989), *recon. den.*, 6 FCC Rcd 5356, 5358 (1991). As noted in the Commission's letter of March 23, 1994 (1800B3-DEB), which denied RNR's opposition to the grant of Station KRBO's license, the interference complained of is the result of lower terrain between the two stations which causes each station's 60 dBu protected and 80 dBu interfering contours to be significantly extended. Further, as stated in the March, 1994, letter, the Commission does not attempt to resolve this type of interference beyond ensuring that the required mileage separations are met, or if waived, that the signal is reduced sufficiently to provide the same level of interference protection that would be provided if the stations were properly separated. RNR has provided no case where the Commission has ordered a station to change channel to end or ease contour overlap interference such as it states Station KRRI is experiencing.

16. Accordingly, IT IS ORDERED, That the petition for rule making filed by Richard W. Myers (RM-8368) to allot Channel 285A to Cal-Nev-Ari, Nevada, IS DENIED.

17. IT IS FURTHER ORDERED, That the petition for rule making filed by Rock "N" Roll, Inc. (RM-8385), to substitute Channel 286C2 for Channel 288C2 at Boulder City, Nevada, substitute Channel 289C2 for Channel 286C2 at Las Vegas, Nevada, and modify the licenses of Stations KRRI and KRBO, respectively, IS DENIED.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: July 18, 1995**

**IN THE MATTER OF KASSON & MANTORVILLE TELEPHONE COMPANY PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36 APPENDIX-GLOSSARY OF THE COMMISSION'S RULES**
**AAD 95-87**

**Comment Date: September 4, 1995**
**Reply Date: September 18, 1995**

On May 23, 1995, the Kasson & Mantorville Telephone Company ("Kasson"), on behalf of its telephone company and its subsidiary, Rock Dell Telephone Company ("Rock Dell") filed a petition for waiver of the definition of "Study Area" as set forth in Part 36 Appendix-Glossary of the Commission's rules. This waiver would allow the consolidation of the Kasson study area with that of the Rock Dell study area in conjunction with the merger of the two companies. Both of these companies are currently average schedule companies for purposes of interstate access settlements, and Kasson, the surviving corporation, will continue to be operated on an average schedule basis. The Petitioners state that the Minnesota Public Utilities Commission approved the merger on January 1, 1995.

Interested parties may file comments on this petition on or before **September 4, 1995**, and reply comments on or before **September 18, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should also reference AAD 95-87. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Accounting and Audits Division, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for the purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

INTERNATIONAL TELECHARGE, INC.,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY,
Defendant.

File No. E-92-66

**ORDER**

**Adopted: June 29, 1995;** **Released: July 18, 1995**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 1, 1992, International Telecharge, Inc. filed the above-captioned complaint against Cincinnati Bell Telephone Company (CBT) seeking to recover damages from CBT for alleged violations of the Commission's rules in connection with CBT's computation and assessment of terminating carrier common line ("CCL") charges. On June 23, 1995, the parties filed a joint motion to dismiss the complaint stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**June 26, 1995**

**Released: July 18, 1995**

IN REPLY REFER TO:
DA 95-1444

Jeff Cracraft
Public Relations
Bracken CableVision
Limestone Cable Vision, Inc.
626 Forest Avenue
Maysville, Kentucky 41056

Dear Mr. Cracraft:

This letter is in reference to your letter dated June 23, 1995 with respect to a complaint filed November 15, 1993 against the price Bracken CableVision was charging for cable programming service in the Town of Augusta, Kentucky, CUID No. KY0321. In that letter, you state that Bracken CableVision is not required to justify its rates prior to May 15, 1994 because Bracken CableVision's Augusta, Kentucky system had 594 subscribers as of the date of the complaint. You further state that as of June 23, 1995, the number of total subscribers is 570. Based on the information you have provided, it appears that the Bracken system qualifies as a "small system" pursuant to 47 C.F.R. § 76.901(c), as amended, and was therefore exempt from rate regulation until May 15, 1994.

We will rule at a later date on Bracken CableVision's justification under the Commission's revised rate regulations of its cable programming service rate in Augusta beginning May 15, 1994.

Should you have any questions regarding this matter, please contact Zenji Nakazawa at (202) 416-0800.

Sincerely,

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

cc: Nancye Southard

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Demopolis CATV CUID No. AL0023 (Demopolis)

Order Denying Jurisdiction

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 11, 1995; Released: July 18, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss complaints against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaints concern a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaints filed against Operator, while asserting that they challenge a CPS rate, challenge only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaints therefore do not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption ARE DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Chatom, Alabama)

**MEMORANDUM OPINION AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 10, 1995; Released: July 18, 1995**

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed on behalf of Creek Indian Enterprises ("CIE"), d/b/a PCI Communications, licensee of Station WYDH(FM), Channel 290A, Atmore, Alabama, directed against the April 26, 1995 staff letter action ("letter") returning as unacceptable its petition for rule making.[1] CIE seeks a change in the reference coordinates for vacant Channel 291C3 at Chatom, Alabama, to specify coordinates 31-37-24 North Latitude and 88-08-14 West Longitude to enable it to maximize its signal coverage in the direction of Chatom, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules. Petitioner asserts that the requested alteration of the geographic coordinates for Channel 291C3 at Chatom will provide it an opportunity to improve its service to its community of license. No opposition or reply comments were filed in response to CIE's petition for reconsideration.

2. In declining to entertain CIE's rule making request to modify the reference coordinates for vacant Channel 291C3 at Chatom, the letter advised petitioner that it is the Commission's policy to protect the integrity of the FM Table of Allotments. Accordingly, in order to ensure that a vacant allotment is not compromised by limiting the availability of transmitter sites, the Commission will not alter reference coordinates outside of a rule making proceeding to change the Table of Allotments. CIE's rule making request would not require a change in the FM Table of Allotments with respect to Channel 291C3 at Chatom, Alabama.

3. Section 1.429 of the Commission's Rules governs the provisions under which the Commission will reconsider a rule making action. Specifically, Section 1.429 permits grant of a reconsideration request premised on facts not previously presented to the Commission under the following circumstances: (1) the facts relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) the facts relied on were unknown to the petitioner until the last opportunity to present them and it could not have learned of the facts through the exercise of ordinary diligence; or (3) the Commission determines that consideration of the facts relied on is required in the public interest. After a careful review of CIE's petition for reconsideration, we find that none of the above enumerated circumstances is present here, and therefore CIE's request must be dismissed.

4. In view of the above, IT IS ORDERED, That the petition for reconsideration filed on behalf of Creek Indian Enterprises, d/b/a PCI Communications, IS HEREBY DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Public Notice of CIE's petition for reconsideration was given on June 2, 1995, Report No. 2076.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Various Locations)

**ORDER**
**(Proceeding Terminated)**

**Adopted: July 11, 1995; Released: July 18, 1995**

By the Chief, Allocations Branch:

1. This *Order* amends Section 73.202(b) of the Commission's Rules, the Table of FM Allotments, to specify the classes of channels allotted to various communities. These amendments are necessary to reflect changes that have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications [Upgrades] by Application*, 8 FCC Rcd 4735 (1993). The attached Appendix shows the Table, as amended for those communities.

2. This action constitutes an editorial change in the Table of Allotments. Therefore, a public notice and comment proceeding is unnecessary. *See* 5 U.S.C. 553(b)(A) and (B).

3. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

| Community | Channel Deleted | Channel Added |
|---|---|---|
| Juneau, Alaska | 274C | 274A |
| Bentonville, Arkansas | 252C2 | 252C1 |
| Monticello, Arkansas | 260A | 260C3 |
| Wynne, Arkansas | 223C3 | 223C2 |
| Carlsbad, California | 240A | 239B1 |
| Sterling, Kansas | 234A | 234C3 |
| Richmond, Kentucky | 269A | 268C3 |
| Basile, Louisiana | 271C3 | 271C2 |
| Staples, Minnesota | 234C3 | 234C2 |
| Aberdeen, Mississippi | 287C3 | 287C2 |
| Bay Springs, Mississippi | 232A | 232C3 |
| Greenwood, Mississippi | 282C2 | 282C3 |
| Pearl, Mississippi | 230A | 230C3 |
| Halfway, Missouri | 256A | 256C3 |
| Ironton, Missouri | 224A | 225A |
| Billings, Montana | 231C | 231C1 |
| Chadron, Nebraska | 234C | 234C1 |
| Belen, New Mexico | 249C | 249C1 |
| Los Alamos, New Mexico | 298C | 298C3 |
| Elk City, Oklahoma | 232A | 232C3 |
| Lawton, Oklahoma | 258A | 258C3 |
| Mullins, South Carolina | 296A | 296C2 |
| Oliver Springs, Tennessee | 254A | 254C3 |
| Clarksville, Texas | 253C3 | 253C2 |
| Waterbury, Vermont | 277A | 277C3 |
| Hayward, Wisconsin | 269A | 266A |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Milledgeville, Georgia)

**MEMORANDUM OPINION AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 11, 1995; Released: July 18, 1995**

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a Petition for Reconsideration ("Petition")[1] filed by Radio Perry, Inc. ("Perry"), licensee of Station WPGA(FM), Channel 265A, Perry, Georgia. Perry seeks reconsideration of the Commission's action denying as unacceptable its March 30, 1993, petition for rule making. Preston W. Small ("Small"), licensee of Station WLRR(FM), Channel 264C3, Milledgeville, Georgia, filed an opposition to Perry's petition. Perry filed a response to Small's opposition.

2. *Background.* This proceeding originated with the filing of a rule making petition by Perry proposing to downgrade Station WLRR(FM) from Channel 264C3 to Channel 264A at Milledgeville, Georgia. Small was granted an upgrade of Station WLRR(FM) from Channel 264A to Channel 264C3 by *Report and Order* ("R&O") in MM Docket No. 89-547, 6 FCC Rcd 3753 (1991). The *R&O* required Small to file a minor change application to implement the upgrade within ninety days of the effective date of the action. Perry argued that since Small had not filed an application to implement the upgrade, he had abandoned his intent to upgrade, and the Table of Allotments should be amended to reflect operation of the Station as a Class A facility. We rejected Perry's arguments and returned the petition for rule making as unacceptable for consideration. We stated that the Commission's Rules do not provide for the automatic downgrading of an allotment when a licensee or permittee fails to file a minor change application to implement that upgrade within the ninety day period set forth in the *R&O*. On June 4, 1993, the Audio Services Division of the Mass Media Bureau sent a letter to Small stating that failure to submit a construction permit application for Class C3 facilities by July 4, 1993, would result in the downgrading of the Milledgeville facility from Channel 264C3 to Channel 264A. On July 6, 1993, Small submitted a construction permit application specifying Class C3 facilities for Station WLRR (BPH-930706IE), thereby demonstrating his interest in the Class C3 channel. That application was accepted for filing.

3. *Petition for Reconsideration.* Perry argues that its petition for rulemaking was erroneously returned as unacceptable for consideration. Perry states that the Commission must issue a *Notice of Proposed Rule Making* to determine whether its rules should be amended to downgrade Station WLRR(FM) from Channel 264C3 to Channel 264A at Milledgeville, Georgia. Perry states that this proposal would enable it to increase its effective radiated power to 6.0 kilowatts for Station WPGA(FM), Perry, Georgia. Perry argues that Small, the licensee of Station WLRR(FM) misrepresented his intention to promptly upgrade that station. Perry contends that Small's failure for over one and one-half years to satisfy the 90 day condition set forth in the *R&O* which granted the request to upgrade Station WLRR(FM) to Channel 264C3 should result in the automatic re-specification of Channel 264A to Milledgeville.

4. *Discussion.* After careful consideration of the pleadings filed in this proceeding, we find that Perry's petition for reconsideration should be denied. Section 1.429 of the Commission's Rules set forth the limited provisions under which the Commission will reconsider a rule making action. Reconsideration is warranted only if the petitioner cites error of fact of law, or he presents facts or circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of its prior action. The Commission will not reconsider arguments that have already been considered. *See Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975). Perry has presented no new arguments. Furthermore, he has not shown any facts that the Commission previously failed to consider or any errors with respect to the facts or law. Rather, he has simply repeated the arguments initially advanced in this proceeding.

5. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Radio Perry, Inc., IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Public notice of the Petition for Reconsideration was given on September 22, 1993, Report No. 1968.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-36**

In the Matter of

Amendment of Section 73.202(b), RM-8547
Table of Allotments,
FM Broadcast Stations.
(Billings, Montana)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 11, 1995; Released: July 19, 1995**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 3881, April 17, 1995, proposing the allotment of Channel 298C to Billings, Montana. The *Notice* was issued in response to a petition filed by Conway Broadcasting ("petitioner"). Petitioner filed comments reiterating its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by allotting Channel 298C to Billings, Montana, since it will provide the community with additional broadcast service. As indicated in the *Notice*, Channel 298C can be allotted to Billings in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 5, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Billings, Montana | 227C1, 231C1, 246C2, 253C1, 275C1, 279C1, 286A, 298C[2] |

4. The window period for filing applications for Channel 298C will open on **September 5, 1995**, and close on **October 6, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 298C at Billings are 45-46-48 and 108-30-18.

[2] The *Notice* in MM Docket 95-65 proposes to add Channel 242C1 to Billings. *See* 10 FCC Rcd 5152 (1995). We note that Conway Broadcasting is also the petitioner in this proceeding. As a precautionary matter, in *Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3914 (1990), *recon. denied*, 6 FCC Rcd 3380 (1991), the Commission held: A statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1105 of the Rules and would be subject to prosecution pursuant to Section 502 of the [Communications] Act [of 1934, as amended], forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-142**

In the Matter of

Amendment of Section 73.202(b), RM-8208
Table of Allotments,
FM Broadcast Stations.
(Willits, California)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 11, 1995; Released: July 19, 1995**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 3674 (1993), issued in response to a petition filed on behalf of Granite Broadcasting Corporation and KNTV, Inc.[1] ("petitioner"), provisionally proposing the deletion of VHF television Channel 11 at Willits, California, to accommodate the petitioner's relocation plans for Station KNTV(TV), Channel 11, San Jose, California. Petitioner filed supporting comments in response to the *Notice*. Opposing comments were filed individually by KTVU, Inc. ("KTVU"), licensee of Station KTVU(TV), Channel 2, Oakland, California; Group W Television, Inc. ("Group W"), licensee of Station KPIX(TV), Channel 5, San Francisco, California; UTV of San Francisco, Inc. ("UTV"), licensee of Station KBHK-TV, Channel 44, San Francisco; KGO Television, Inc. ("KGO"), license of Station KGO-TV, Channel 7, San Francisco (collective commenters are referred to herein as the "objectors"); and by William H. and Ronna L. Sauro (the "Sauros"). Petitioner filed a consolidated reply to the opposition comments. Reply comments were also filed individually by KTVU and Group W, and jointly by UTV and KGO.

2. Petitioner, licensee of Station KNTV(TV), Channel 11, San Jose, California, requested the deletion of vacant VHF Channel 11 at Willits, or alternatively, the substitution of a UHF channel at Willits. Petitioner maintains that at its present site on Loma Prieta Peak, located on the Sargent-Berrocal fault, and near the San Andreas fault, Station KTVU(TV) sustained damage to its transmitter tower and antenna in the Loma Prieta earthquake in October 1989. As Loma Prieta Peak is located in a seismically active region, petitioner desires to relocate its transmitter to a site north of San Jose, which it considers less susceptible to severe seismic activity. As stated in the *Notice*, petitioner's concern is related not only to the potentially significant cost of future seismic activity on Loma Prieta Peak, but as Station KNTV(TV) is a primary television source of news for San Jose's residents, to enable it to provide crucial information during future emergencies as well.

3. Petitioner stated that geographic and topographic factors combined limited the relocation of Station KNTV(TV)'s transmitter to the north. However, petitioner advised that vacant Channel 11 at Willits constrained its ability to move in that direction.[2] Additionally, petitioner advised that further movement to the south would result in diminishment of Station KNTV(TV)'s signal strength and terrain shielding due to the Santa Cruz Mountains. Movement in an easterly direction is limited by Station KRXI(TV), Channel 11, Reno, Nevada.[3]

4. In support of the requested deletion of vacant Channel 11 at Willits, or the substitution of a UHF channel therefor,[4] petitioner urged that Willits would not be deprived of potential television service as Channel 11 may never be authorized. As stated in the *Notice*, Channel 11 at Willits is not available for application due to the present freeze on the filing of applications for new TV stations in certain metropolitan areas. *See Order, supra.* Willits is within 304.9 kilometers (189.5 miles) of San Francisco, one of the affected freeze markets.

5. Although Channel 11 was allotted to Willits in 1987, it has been unavailable for applications pending completion of the Commission's ATV proceeding, *supra.* Under the circumstances, we stated our hesitancy to delete the channel. Therefore, the *Notice* provisionally proposed the deletion of Channel 11 at Willits, subject to the submission of further justification and information from the petitioner.[5] Nevertheless, we stated that in the event an expression of interest in retaining Channel 11 at Willits was received during the initial comment period, the allotment may be

[1] As indicated in the *Notice*, KNTV, Inc., the licensee of Station KNTV(TV), Channel 11, San Jose, California, is a wholly-owned subsidiary of Granite.

[2] Coordinates at the reference site for Channel 11 at Willits are 39-32-28 and 123-29-16.

[3] Coordinates at the authorized site of Station KRXI(TV) are 39-35-28 and 123-29-16.

[4] Petitioner's alternate request to substitute a UHF channel as a replacement for VHF Channel 11 at Willits to accommodate its relocation plans was not entertained in the *Notice*. Rather, petitioner was advised that consideration of a UHF replacement for VHF Channel 11 at Willits was constrained by the terms of the Commission's current freeze on allotments in certain television markets, pending the outcome of the advanced television ("ATV") proceeding. *See Order, Advanced Television Systems and Their Impact on the Existing Television Service*, 52 FR 28346, published July 29, 1987. As Willits is located within 304.9 kilometers (189.5 miles) of San Francisco, one of the affected markets, petitioner was advised that its substitution request would only be considered if an acceptable UHF channel could be found upon completion of the Commission's allotment plan for ATV use in the San Francisco area.

[5] Specifically, petitioner was requested to address the following questions: whether its proposal could be accommodated from its intended site by placing a further site restriction on Channel 11 at Willits; whether petitioner could operate Station KNTV(TV) in a manner designed to avoid interference to the Willits allotment; whether, assuming a further site restriction on Channel 11 at Willits, petitioner could provide reasonable assurance of an available transmitter site conforming to the restriction; whether there are any transmitter sites available for Station KNTV(TV) that would meet the spacing requirements to Channel 11 at Willits, and if so, why those locations would not be suitable to accommodate petitioner's relocation plans; and why

retained in the absence of a compelling showing that the deletion would be more conducive to serving the public interest.

6. In response to our request for further justification and information, petitioner asserts that its proposal cannot be accommodated by a further site restriction on Channel 11 at Willits. Petitioner advises that the specified reference point for Channel 11 at Willits, located 18.6 kilometers north of the community, places it as close to Station KNTV(TV)'s San Jose site and the site specified for Station KRXI(TV), Channel 11, Reno, Nevada, as the minimum distance separation requirements of the Commission's Rules allows. Further, petitioner remarks that while there are other theoretical sites from which service to Willits could be provided that would meet all applicable spacing requirements, line-of-sight coverage of Willits cannot be accomplished from any of those sites. Petitioner alleges that as Willits is surrounded by mountains, even the current site restriction on Channel 11 at Willits does not provide for unobstructed coverage of the community as required by Section 73.685(b) of the Commission's Rules. Therefore, petitioner comments that due to terrain shadowing, a further site restriction on Channel 11 would only exacerbate the current deficiency.

7. In response to our question whether petitioner could operate Station KNTV(TV) in a manner designed to avoid interference to Channel 11 at Willits, petitioner remarks that if it reduced its power or directionalized its antenna either from its present site, or any other site, it would significantly degrade its service to the 1.4 million residents of San Jose as well as an estimated 6.6 million residents within its Grade B contour.

8. Further, petitioner asserts that due to the area topography, there are no sites available to relocate Station KNTV(TV) consistent with the requirements of Section 73.610 of the Commission's Rules, with respect to Channel 11, Willits. Nor is it possible for Station KNTV(TV) to move its site in a southerly direction, as such relocation would result in its inability to comply with the requirements of Section 73.685 of the Commission's Rules. Thus, petitioner asserts there are no fully-spaced sites from which it can provide service to San Jose and other pockets of population within its service area that compares with, or is superior to its current level of service.

9. Petitioner advises that there are five potentially alternate sites located approximately 3.5 to 5.5 miles north and northwest of its current site which are the least short-spaced locations that would enable Station KNTV(TV) to achieve its goal. However, none of the sites can be considered absent the deletion of Channel 11 at Willits. Petitioner claims that the alternate locations, some of which are established communications sites, offer both the needed elevation and accessibility. Based upon the declaration of Richard E. Hammond, petitioner's consultant on seismic events, the area containing the five alternate sites are further removed from both the San Andreas and the Sargent faults, and are not located on any seismically active fault. Therefore, petitioner believes the risk of destructive seismic activity is less at any of the alternative sites than at its current transmitter site on Loma Prieta Peak.

10. The objectors provided documented evidence of experts in seismological and structural engineering to demonstrate that contrary to petitioner's claim, seismic instability may be greater at sites to the north of Loma Prieta Peak. According to Dr. C.B. Crouse, P.E., a consultant who specializes in earthquake and seismology engineering, as a result of the 1989 Loma Prieta earthquake, built-up stress in the Sargent fault was released and thus petitioner's current transmitter site is probably one of the more seismically stable areas in the San Francisco Bay Area. Additionally, the objectors assert that the presence of numerous other transmitting facilities on Loma Prieta Peak suggests that it is not an unsuitable communications site.[6] Moreover, the objectors advise that there is at least one site available to the south which would not require the deletion of Channel 11 at Willits.[7] Objectors claim that the availability of such sites is fatal to petitioner's proposal. *See Notice*, 8 FCC Rcd at 3674-75, ¶ 5.

11. Moreover, according to the objectors' consultants, structural improvements to the antenna of Station KNTV(TV) at its present site designed to comply with modern wind load criteria, in addition to framing the tower to a pinned base, would minimize the risk of damage by permitting rotation of the base. Therefore, the objectors urge that a relocation of Station KNTV(TV) from its present site is not necessary to reduce the likelihood of potential earthquake damage.

12. Additionally, the objectors advise that contrary to petitioner's claim that Station KNTV(TV) is the principal source for the dissemination of news and information to the San Jose area, four other television stations are licensed to San Jose. Additionally, a multiplicity of stations from the San Francisco-Oakland-San Jose, Sacramento-Stockton and Salinas-Monterey television markets supply predicted Grade B service to San Jose. Conversely, the objectors comments that as Willits is an underserved community, the deletion of Channel 11 at that locality would be inconsistent with the Commission's television allocation policy. *See Sixth Report and Order*, 41 F.C.C.148, 167 (1952).[8]

13. Moreover, the objectors comment that petitioner's argument that the deletion of Channel 11 at Willits will not have on adverse impact on the public interest as it is

any particular site chosen by petitioner for the relocation of Station KNTV(TV) is less susceptible to earthquakes than other area sites.

[6] According to the objectors documented engineering, Loma Prieta is a *principal* communications location for the San Jose area. In addition to the petitioners' Station KNTV(TV), Station KLXV-TV, Channel 65, San Jose is also located there, as is a TV Booster station, an LPTV station, an ITFS station, four FM stations, numerous point-to-point microwave stations and land mobile stations. To the objectors' knowledge, none of the other stations has sought to relocate from Loma Prieta based upon potential seismic peril at that site.

[7] In this regard, according to the objectors' engineering summary, Station KNTV(TV) could relocate consistent with Section 73.610 of the Commission's Rules at a site 8 kilometers (5 miles) southeast, either at or near the transmitter site of Station KSBW(TV), Channel 8, Salinas. From that location, a 77 dBu contour would encompass San Jose, consistent with Section 73.685 of the Commission's Rules, provided Station KNTV(TV) employed facilities comparable to those of Station KSBW(TV). Therefore, objectors' engineering submits that it is unnecessary for Station KNTV(TV) to relocate to the north to surmount geographic and terrain factors.

[8] The objectors advise that Willits is presently served by Station KFWU(TV), Ft. Bragg, California, only, which is a satellite of Station KRCR-TV, Redding, and that no other station, or potential allocation, places or could place even a Grade B contour over Willits.

likely it will eventually be deleted to accommodate ATV allotments, is premature as many ATV-related issues remain unsettled.[9] The objectors also assert that the Channel 11 allotment at Willits, which has been unavailable for application since 1987 pending completion of the Commission's ATV proceeding, provides the promise of affording a second local television service to a sizeable area of northern California. Therefore, the objectors conclude that petitioner has failed to demonstrate a compelling showing of the public interest need for the deletion of Channel 11 at Willits. The objectors claim that petitioner has not proven that its present transmitter site on Loma Prieta is more seismically unstable than other sites, or that other identified, suitable sites are unavailable to it. Therefore, the objectors urge denial of the proposal.

14. The Sauros' remark that the effect of the ATV freeze has precluded the opportunity to initiate local television service at Willits, while petitioner's proposal would deny Willits' residents the opportunity for such service in the future. The Sauros advise that once the ATV freeze has been removed they will file an application to operate a new television station on Channel at Willits.

15. In response to the objectors' comments, petitioner avers that it has fully addressed the concerns posed in the *Notice*. Petitioner refutes the objectors' showings, stating that the suggested use of an alternate site at or near the site of Station KSBW(TV) to the southeast of Loma Prieta, would not decrease the earthquake hazard, and based upon its engineering studies, would result in degradation of its signal coverage of San Jose due to intervening terrain obstructions. Petitioner maintains that unless the Willits allotment is eliminated, it cannot relocate the transmitter for Station KNTV(TV) to a more seismically secure area from which it could provide comparable or better service to San Jose and the surrounding vicinity than that achieved from its current site.

16. Further, petitioner asserts that deletion of Channel 11 at Willits will not be detrimental to the public interest as the Willits allotment is technically defective. In this regard, petitioner states that spacing constraints preclude a further site restriction on Channel 11 at Willits, and there are no other sites from which line-of-sight coverage of Willits can be provided.

17. As to the petitioner's identification of alternative short-spaced sites north of Loma Prieta Peak, objectors respond that the spacing deficiencies from those sites to the Channel 11 reference point at Willits is minimal (*i.e.*, 3.5-5.5 miles northwest of the existing KNTV(TV) site). Therefore, the objectors urge that petitioner could request a waiver of the *de minimus* short spacing in the application context, rather than deleting the Willits allotment. Moreover, objectors assert that petitioner did not provide technical information or analysis, as requested in the *Notice* (¶ 5), to demonstrate whether Station KNTV(TV) could be operated in a manner which could provide interference protection to Channel 11 at Willits. In this regard, the objectors state that petitioner merely made general assertions regarding loss of coverage at sites to the south of Loma Prieta, rather than providing specific engineering analysis pertaining to directionalization, use of channel offsets, and terrain shielding to provide interference protection.

18. Additionally, according to the objectors' engineering consultants, from a site south of Loma Prieta Peak, at or near the transmitter of Station KSBW(TV), Salinas, California, Station KNTV(TV) could provide 77 dBu service to 95% of San Jose, thus satisfying the Commission's application criteria to demonstrate the ability to provide coverage over at least 80% of a station's licensed community.

19. The objectors also note that petitioner did not address the alternative of structural improvements to its existing tower for Station KNTV(TV) at Loma Prieta Peak. Nor did petitioner offer any expert opinion to validate that the alternative sites it is considering north of Loma Prieta Peak are more seismically stable than its present location. In the absence of a convincing demonstration that such lesser alternatives are unavailable, the objectors urge that petitioner has failed to make a compelling public interest showing to justify the Willits deletion. Moreover, the objectors urge that the current expression of interest in the use of Channel 11 at Willits clearly bars its deletion at that community, citing *Montrose and Scranton, Pennsylvania*, 5 FCC Rcd 6305 (1990).

20. In view of the Sauros' expression of interest in retaining Channel 11 at Willits, in accordance with established Commission policy,[10] we will deny the petitioner's proposal. As stated in the *Notice*, the receipt of an expression of interest in retaining Channel 11 at Willits may result in its retention in the absence of a compelling public interest justification requiring its deletion. Even if an expression of interest had not been received, we believe the petitioner has failed to demonstrate that its current site is more susceptible to ground movement than other unspecified sites north of Loma Prieta Peak to which it desires to relocate Station KNTV(TV). Nor has petitioner convincingly demonstrated the lack of available sites elsewhere that would not require the deletion of Channel 11 at Willits, or demonstrated why "equivalent protection" measures[11] could not be employed at a preferred site to accommodate its relocation plans.

21. Furthermore, contrary to petitioner's assertion, we do not believe that based upon the information presented, Channel 11 is a defective allotment at Willits. Although the petitioner alleges that the mountainous terrain surrounding Willits precludes line of sight service to that community, other sites closer to the community may be available in connection with an applicant's request for waiver of Section 73.685 of the Commission's Rules. Additionally, the retention of Channel 11 at Willits is consistent with the Commission's television allocation policy priorities 2 and 3 "To provide each community with at least one television broadcast station" and "To provide a choice of at least two

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[9] Citing, *e.g.*, *Second Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 7 FCC Rcd 3340 (1992).

[10] *See, e.g.*, *Snow Hill and Kinston, North Carolina*, 55 FCC 2d 769 (1975); *Red Oak, Iowa*, 46 FCC 2d 344 (1974); *Fond du Lac and Sheboygan, Wisconsin*, 55 RR 2d 592, 594 (1984); *Martin and Salyersville, Kentucky*, 50 RR 2d 502 (1981).

[11] Equivalent protection may be achieved by any one or any combination of the following: precise offset, directional transmitting antenna, reduction in power, reduction in antenna height, or perhaps terrain shielding. The latter consideration may be employed in a limited number of special situations where such shielding can be predicted with a high degree of confidence. As Group W notes, the provision of "equivalent protection" from a short-spaced site is a significant factor in the consideration of any waiver request, citing *Caloosa Television Corp.*, 3 FCC Rcd 3656, 64 R.R. 2d 1640 (1988).

television services to all parts of the United States." *See Sixth Report and Order, supra.* Based upon the above considerations, the petitioner's proposal cannot be reconciled with the public interest.

22. Accordingly, IT IS ORDERED, that the request of Granite Broadcasting Corporation and KNTV, Inc. to delete VHF Channel 11 at Willits, California (RM-8208) IS DENIED.

23. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

24. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-91**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8197 |
| Table of Allotments, | RM-8279 |
| FM Broadcast Stations. | |
| (Berlin, De Forest, Markesan and Wautoma, Wisconsin)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 12, 1995; Released: July 19, 1995**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 8 FCC Rcd 2747 (1993), proposing the allotment of Channel 226A to De Forest, Wisconsin, as that community's first local transmission service. The *Notice* was issued in response to a petition filed by De Forest Broadcasting Company ("petitioner"). To accommodate the allotment at De Forest, petitioner also requested the substitution of Channel 272A for Channel 226A at Wautoma, Wisconsin and substitution of Channel 284A for Channel 272A at Berlin, Wisconsin. Petitioner filed comments restating its interest in Channel 226A at De Forest. Mark J. Kasten d/b/a Markesan Broadcasting Company ("MBC") and Wautoma Radio Company ("WRC") filed counterproposals.[2] Kingsley H. Murphy, Jr. ("Murphy") and MBC filed reply comments. Late-filed comments were received from petitioner, MBC and Murphy.[3]

2. MBC counterproposed the allotment of Channel 284A to Markesan, Wisconsin. According to MBC, the requested allotment would provide a first local service to Markesan, a community of 1,519 people. MBC has stated its intention to construct and operate a commercial broadcast station in Markesan if its counterproposal is granted.

3. Murphy, licensee of Station WISS-FM, Berlin, Wisconsin, filed comments in response to the *Notice*. Murphy notes that although petitioner made an initial commitment to reimburse Station WISS-FM for its frequency-changing expenses in the event it is the ultimate permittee of Channel 226A at De Forest, it neglected to do so in comments. Murphy considers this omission to be a very serious matter and urges that petitioner's proposal be denied unless it restates its reimbursement commitment. Murphy points out that the timing of a frequency change for an operating station is a more complex matter than usual, where as here, there is the potential for a comparative broadcast proceeding to select a permittee at De Forest. It could take years before a construction permit is actually issued for the channel at De Forest. For these reasons, Murphy urges that if a frequency change at Berlin is ordered, the order should not contain the usual requirement to submit an application within 90 days of the effective date of the order. Rather, Murphy contends that he should not be required to file any modification application until 90 days after the selection of a permittee for Channel 226A at De Forest becomes final and Murphy receives a reimbursement commitment from the permittee.

4. Murphy, in reply comments, states his support of the allotment of a channel at De Forest and proposed substitutions at Berlin and Wautoma. Murphy indicates that the substitution will permit Station WISS-FM to seek a six kilowatt class A upgrade which is not feasible on its current channel. Murphy objects to the counterproposals filed in this proceeding and requests that they be dismissed and the FM Table of Allotments be amended as proposed in the *Notice*.

5. In reply, MBC asserts that an allotment at Markesan would provide a first aural service to approximately 2,000 persons in some 72 square miles, and a second aural service would be provided to approximately 3,300 persons. Further, the community of Markesan is underserved as it presently receives only one reception service from Station

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[1] The community of Markesan has been added to the caption.

[2] Public notice of the counterproposal filed by Markesan Broadcasting Company was given on June 30, 1993 (Report No. 1949). WRC's counterproposal is unacceptable for consideration and therefore was not placed on public notice. Although the *Notice* considers WRC as an applicant, we note that on June 11, 1993, the same date counterproposals were due in this proceeding, the Commission granted WRC a construction permit, which enables it to request an upgrade. WRC proposed the substitution of Channel 226C3 for Channel 226A at Wautoma, Wisconsin, denial of an allotment at De Forest, Wisconsin and no change at Berlin, Wisconsin. Channel 226C3, at WRC's proposed site 43-59-25 and 89-11-40, is short spaced to a construction permit for Station KFKQ, Channel 225A, New Holstein, Wisconsin. Although WRC provided a letter from Frederick W. Kinlow, proprietor of Station KFKQ, indicating it would consent to relocate its transmitter and seek authorization under Section 73.215 of the Commission's Rules, to accommodate the Wautoma Channel 226C3 proposal, WRC failed to include a technical showing demonstrating a site exists for Channel 225A at New Holstein that complies with the Commission's minimum distance separation requirements. This information permits all parties the opportunity to fully respond and permits the Commission staff to determine compliance with the Commission's spacing requirements. The counterproposal is dependent on Station KFKQ relocating its facility. The Commission has previously stated that counterproposals must be technically correct and substantially complete when filed to afford all parties an opportunity to fully respond in reply comments. *See Eldorado and Lawton, OK*, 5 FCC Rcd 6737 (1990), and cases cited therein. Even if the counterproposal had been accepted, we note that in a comparative situation such as this one, a first local service (De Forest or Markesan) is preferred over an upgrade (Wautoma). *Andalusia, Alabama*, 49 Fed. Reg. 32201, published August 13, 1984, states our policy that a modification of a license to a superior channel does not provide as great a public interest benefit as that of a new primary service.

[3] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the unauthorized pleadings.

WPKR(FM), Omro, Wisconsin. MBC states that Markesan is an ideal community for a new FM allotment as it has a population of 1,519, is incorporated with numerous retail establishments and provides an array of professional services for its residents. Markesan has its own local government, fire and police departments and a library. MBC contends that Markesan is more deserving than De Forest of a new allotment because it is a more isolated community, has fewer reception services and will provide a first and second full-time aural service in the area.

6. We have before us two mutually exclusive rulemaking proposals. In an effort to accommodate both proposals, the staff performed a search to determine if an alternate channel was available to provide service to both communities. The study indicates there are no other channels meeting the spacing requirements. Therefore, our decision in this proceeding is guided by the allotment priorities as set forth in *Revision of the FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1986).[4]

7. The allotment of Channel 226A to De Forest or Channel 284A to Markesan would provide a first local service to either community, fulfilling priority (3). Contrary to MBC's statement that the allotment at Markesan would provide a first and second aural service, our engineering analysis indicates that neither allotment will provide any first or second aural service. Therefore, our decision must be based on priority (4) - other public interest factors. In this regard, we find that the community of De Forest has a larger population (4,882) than Markesan (1,496).[5] We also find that the smaller community of Markesan receives service from 4 FM stations and 4 AM stations and is, therefore, considered to be well served.[6] De Forest receives service from 13 FM signals and 5 AM signals. Although De Forest is located closer to the larger community of Madison, Wisconsin, neither community is underserved as to reception services. While De Forest and Markesan are both incorporated, have their own post office and zip code, there is a considerable difference in the populations. Thus, we believe that the public interest would be best served by allotting Channel 226A to De Forest since it has the larger population. *See Clarksville and Lanesville, Indiana*, 4 FCC Rcd 4968 (1989); *Roswell, Georgia*, 2 FCC Rcd 2775 (1987).

8. Channel 226A can be allotted to De Forest, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 272A is substituted for Channel 226A at Wautoma, Wisconsin, and Channel 284A is substituted for Channel 272A at Berlin, Wisconsin.[7] There is a site restriction 1.9 kilometers (1.2 miles) north of De Forest to prevent a short spacing to Station KATF, Channel 225C1, Dubuque, Iowa. Wautoma Radio Company is the sole applicant for Channel 226A at Wautoma, Wisconsin (File No. BPH-880421NZ).[8] The substitution at Wautoma can be made in compliance with the Commission's spacing requirements at the applicant's current site. The applicant for Channel 226A at Wautoma will be permitted to amend its application to specify the new Class A channel and retain its cut-off protection. Station WISS-FM, Berlin, operates on Channel 272A. Channel 284A can be substituted for Channel 272A at Berlin, Wisconsin, in compliance with the Commission's spacing requirements at the current site for Station WISS-FM.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 5, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Berlin, Wisconsin | 284A |
| De Forest, Wisconsin | 226A |
| Wautoma, Wisconsin | 272A |

10. Pursuant to Commission policy, reimbursement of Station WISS-FM, Berlin, by the ultimate permittee of Channel 226A at De Forest, Wisconsin, for the reasonable costs of changing its frequency will be required and governed by *Circleville, Ohio*, 8 FCC Rcd 159, 163 (1967). Once a permit has been granted, we expect parties to negotiate in good faith, subject to Commission review in the event of disagreement. *See Mayfield and Wickliff, Kentucky*, 48 RR 2d 1232 (1981). Finally, we note that Station WISS-FM need not take steps to change frequency until it is assured that it will receive payment. *See Churchville and Luray, Virginia*, 5 FCC Rcd 1106 (1990), *recon. denied*, 6 FCC Rcd 1313 (1991).

11. IT IS FURTHER ORDERED, That the Secretary of the Commission, Shall Send by Certified Mail, Return Receipt Requested a copy of this *Order* to the following:

Howard J. Braun
Jerold L. Jacobs
Rosenman & Colin
1300 - 19th Street, N.W.
Suite 200
Washington, D.C. 20036
(Counsel for Kingsley H. Murphy, Jr.)

Wautoma Radio Company
981 Howard Street
Green Bay, Wisconsin 54303

Markesan Broadcasting Company
P.O. Box 82
Brandon, Wisconsin 53919

12. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station WISS-FM, Berlin, Wisconsin, IS MODIFIED, to specify operation on Channel 284A, subject to the following conditions:

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[4] (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) other public interest matters. [Co-equal weight given to priorities (2) and (3)].

[5] All population figures are taken from the 1990 Census.

[6] The community of Markesan receives service from Stations WOLX, Baraboo, WI, WTCX, Ripon, WI, WPKR, Omro, WI, WISS, Berlin, WI, WISN(AM), Milwaukee, WI, WHA(AM), WIBH(AM), and WTSO(AM), Madison, WI.

[7] d The coordinates for Channel 226A at De Forest are 43-16-08 and 89-20-09. The coordinates for Channel 272A at Wautoma are 44-04-18 and 89-17-30. The coordinates for Channel 284A at Berlin are 43-56-55 and 88-59-09.

[8] On June 11, 1993, Wautoma Radio Company was granted a construction permit for Channel 226A at Wautoma, conditioned on the outcome of this proceeding. Therefore, permittee is not entitled to reimbursement. *See Pacific Grove and Soledad, California*, MM Docket 90-17, 5 FCC Rcd 6700 (1990).

(a) Nothing contained herein shall be construed as authorizing any change in License BMPH-900209KA except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BMPH-900209KA, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Station WAEI, Wautoma, Wisconsin, IS MODIFIED, to specify operation on Channel 272A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Permit BPH-880421NZ except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Permit BPH-880421NZ, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

14. The window period for filing applications for Channel 226A at De Forest, Wisconsin will open on **September 5, 1995**, and close on **October 6, 1995**.

15. IT IS FURTHER ORDERED, That the counterproposal filed by Markesan Broadcasting (RM-8279) IS DISMISSED.

16. IT IS FURTHER ORDERED, That the counterproposal filed by Wautoma Radio Company, IS DENIED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Various Locations)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 12, 1995; Released: July 19, 1995**

By the Chief, Allocations Branch:

1. This *Order* amends Section 73.202(b) of the Commission's Rules, the Table of FM Allotments, to specify the classes of channels allotted to various communities. These amendments are necessary to reflect changes that have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989), and the *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications [Upgrades] by application*, 8 FCC Rcd 4735 (1993). The attached Appendix shows the Table, as amended for those communities.

2. This action constitutes an editorial change in the Table of Allotments. Therefore, a public notice and comment proceeding is unnecessary. *See* 5 U.S.C. 553(b)(A) and (B).

3. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

| Community | Channel Deleted | Channel Added |
|---|---|---|
| Huntsville, Arkansas | 258A | 258C3 |
| Arnold, California | 291A | 291B1 |
| Ormond-by-the-Sea, Florida | 239A | 239C3 |
| Des Moines, Iowa | 298C2 | 298C1 |
| Erath, Louisiana | 299C3 | 300C1 |
| Grayling, Michigan | 262C2 | 262C1 |
| Newberry, Michigan | 250C1 | 250C2 |
| Fallon, Nevada | 267A | 267C2 |
| Cuero, Texas | 249A | 249C3 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ADELPHIA CABLE PARTNERS, L.P.

Petition for Revocation

of the Certification of
Metropolitan Dade County, Florida
to regulate basic service rates in the
incorporated areas of:
Florida City (FL 0401)
Homestead (FL 0237)
Key Biscayne (FL 0528)

**ORDER**

**Adopted: July 14, 1995; Released: July 19, 1995**

By the Chief, Cable Services Bureau:

1. On November 29, 1993, Adelphia Cable Partners, L.P. ("Adelphia") filed a petition for revocation of certification and a request for stay of rate regulation challenging the certification of Metropolitan Dade County, Florida ("Dade County") to regulate Adelphia's basic service rates and associated equipment in the incorporated areas of Florida City, Homestead and Key Biscayne. On December 29, 1993, Dade County filed a response to Adelphia's petition along with a request for hearing. Key Biscayne also filed a response to Adelphia's petition on the same date. Adelphia filed a reply to both responses on January 12, 1994. Subsequently, on June 2, 1995, Adelphia filed a withdrawal of its petition for revocation and request for stay.

2. Accordingly, IT IS ORDERED that the petition for revocation of certification and request for stay filed by Adelphia Cable Partner, L.P. with respect to the regulation of basic service rates and associated equipment by Metropolitan Dade County in the cities of Florida City, Homestead, and Key Biscayne ARE DISMISSED WITHOUT PREJUDICE.

3. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

DYNAMIC CABLEVISION
OF FLORIDA, LTD.

Petition for Revocation

of the Certification of
Metropolitan Dade County, Florida
to regulate basic service rates in the
incorporated areas of:
Hialeah (FL 0202)
Coral Gables (FL 0674)
Hialeah Gardens (FL 0675)
Medley (FL 0429)
Miami Springs (FL 0427)
Sweetwater (FL 0422)
Virginia Gardens (FL 0428)
West Miami (FL 0553)

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 14, 1995; Released: July 19, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On December 23, 1993, Dynamic Cablevision of Florida, Ltd. ("Dynamic") filed a petition for revocation of certification, motion for declaratory ruling and a request for stay of rate regulation challenging the certification of Metropolitan Dade County, Florida ("Dade County" or the "County") to regulate Dynamic's basic service rates and associated equipment in the incorporated areas of Hialeah, Coral Gables, Hialeah Gardens, Medley, Miami Springs, Sweetwater, Virginia Gardens and West Miami. On January 21, 1994, Dade County filed a response to Dynamic's petition along with a request for hearing. Dynamic argues that the County's ordinance implementing rate regulation is inconsistent with the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[1] and the Commission's rules.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] To qualify for certification, a franchising authority must confirm that it has the legal authority and personnel to regulate rates, that it will adopt and administer regulations that are consistent with the Commission's rules, and that interested parties will be provided with a reasonable opportunity to comment during rate proceedings.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] After that time period has expired, a cable operator may challenge a franchising authority's certification by filing a petition for revocation.[7] Grounds for revocation of a franchising authority's certification include, *inter alia*, the nonconformity of state and local laws to the Commission's rate regulations.[8] If the Commission, after granting the franchising authority reasonable opportunity to comment, determines that state and local laws and regulations are not consistent with the Commission's rules, the Commission shall revoke the certification of the franchising authority.[9] In such cases the Commission will assume jurisdiction over basic service rates until the franchising authority becomes recertified.[10]

## II. PETITION FOR REVOCATION AND RESPONSIVE PLEADING

### A. Arguments

3. Dynamic's petition challenges a portion of Dade County's rate ordinance[11] claiming that it is inconsistent with the 1992 Cable Act and the Commission's rules. Pursuant to the ordinance under which Dade County claims

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] Dade County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on September 16, 1993. The certification became effective on October 16, 1993. Dade County's filing covered all of the incorporated communities listed above as well as the unincorporated areas of the County. Dynamic's petition is limited to Dade County's certification to regulate its basic service rates in the incorporated areas of the County.

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] Communications Act of 1934 § 623(a)(3), 47 U.S.C. § 543(a)(3); 47 C.F.R. § 76.910(b).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. § 76.914.

[8] Communications Act of 1934 § 623(a)(5), 47 U.S.C. § 543(a)(5).

[9] Communications Act of 1934 § 623(a)(5), 47 U.S.C. § 543(a)(5); *See also Report and Order and Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5699 (1993) (*"Rate Order"*).

[10] Communications Act of 1934 § 623(a)(6), 47 U.S.C. § 543(a)(6).

[11] Specifically, Section 8AA-61.01, the disputed portion of Dade County's rate ordinance, outlines the following regulatory structure:

authority to regulate basic service rates. Dade County asserts jurisdiction to regulate rates in both the incorporated and unincorporated areas of the County, except that the County at its discretion may decline to exercise its jurisdiction in a municipality if the municipality has become certified to regulate and the cable operator providing service in that municipality does not provide service outside the municipality, or if certain other factors are present.[12] If the County declines to exercise jurisdiction within a municipality, the municipality may set a rate within the municipal franchise area that is different from the rate set by the County in the unincorporated areas, provided that the municipal rate is consistent with the Commission's regulations.[13] However, if a municipality's rate determination is set aside by the Commission, the County's rate determination will apply within that municipality unless the Commission sets a rate or until the municipality establishes a new lawful rate.[14]

4. Dynamic asserts that, despite a duplicative licensing scheme, cable operators in Dade County have historically been regulated solely by the municipal franchise authorities. Dynamic argues that the County's rate ordinance authorizes a county-wide rate review process independent from any regulatory review initiated at the municipal level. Dynamic contends that the ordinance allows the County to regulate the basic service rates of its municipally-franchised systems regardless of whether the municipality has itself certified or has determined that the system's rates are reasonable. Dynamic notes that both the County and two of the eight municipalities that it serves within Dade County have certified with the Commission to regulate rates creating the actual possibility of duplicative and inconsistent rate decisions.[15] Dynamic argues that the resulting possibility of dual regulation of its basic service at the local level undermines the intent of the 1992 Cable Act by creating a two tiered regulatory structure shared between county and local authorities. Dynamic states that the plain language of the 1992 Cable Act indicates that basic cable service shall be subject to regulation by "a franchising authority." Dynamic argues that this singular reference clearly indicates that only one local entity may be responsible for basic service regulation. Moreover, Dynamic argues that, in contradiction of the Commission's rules, the Dade County ordinance provides that the County's rate determination will govern in place of the municipality's rate determination where the latter has been set aside by the Commission and the Commission itself has not established a rate for the basic tier. Dynamic requests that the Commission revoke the County's certification, declare that the County is forbidden to regulate rates in the incorporated areas of the County and stay the County's rate regulatory authority.

5. In response, Dade County argues that the Commission should refer to state law to determine which governmental entity is the appropriate franchising authority for rate regulation purposes. Dade County argues that, under the 1992 Cable Act, a franchising authority is defined as "any governmental entity empowered by Federal, State, and local law to grant a franchise."[16] Dade County also asserts that the Commission further clarified that the appropriate "franchising authority," for rate regulation purposes, is the authority empowered by state law to regulate rates.[17] Dade County asserts that the home rule powers granted to Dade County by the Florida constitution uniquely qualify Dade County as that entity. Under its home rule authority, the Florida constitution delegates to Dade County all legislative powers that once resided in the Florida legislature over matters local to Dade County, including municipal affairs.[18] Pursuant to its home rule powers, Dade County has established a two tiered system of franchising in which a cable operator must obtain both a county-wide franchise from Dade County and a municipal franchise from each incorporated municipality in which it seeks to operate. Dade County's cable regulations and oversight responsibilities apply in both the incorporated and unincorporated areas of the County.[19] Thus, Dade County concludes that it is a qualified "franchising authority" in both the incorporated and unincorporated areas of the County, within the guidelines of federal law.[20]

6. Dade County also argues that its rate ordinance constitutes an appropriate "limited delegation" of its own powers as franchising authority to the municipalities within its jurisdiction. The County asserts that its ordinance delegates

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(1) Scope of this Regulation

(a) Dade County Jurisdiction. This section concerning rate regulation shall apply in incorporated and unincorporated Dade County. Dade County, at its discretion, may decline to exercise jurisdiction in a municipality where: (1) a Licensee's Dade County service area as authorized by Dade County does not extend beyond the corporate limits of the municipality, and the municipality is certified by the F.C.C. and has in place regulations that are consistent with rate regulations adopted by the F.C.C.; or (2) rate regulation should be left solely to the municipality because the municipality has requested such treatment, cost factors unique to that municipality control the analysis, or the municipality does not participate with the County in sharing costs or information.

(b) Municipal Jurisdiction. Where Dade County has set a rate for a Licensee that has a Dade County license area that includes municipalities, such an included municipality may set a rate within its municipal license area that is different from the Dade County rate, provided that the municipal rate complies with applicable federal rules and regulations. Such municipal rate shall control in the municipal license area. Nothing herein shall prohibit the County, at its discretion, from regulating rates jointly with one or more municipalities.

(c) Notwithstanding any of the above provisions, in the event that a municipal rate determination or regulation is set aside due to a failure to comply with applicable law, the County's rate determination will apply within that municipality, unless the F.C.C sets a rate or until the municipality establishes a lawful rate.

[12] Dade County Ordinance No. 93-120, § 1(a) (1993), Code of Metropolitan Dade County § 8AA-61.01(1)(a).

[13] *Id.*, § 8AA-61.01(1)(b). Alternatively, a municipality and the County may regulate jointly. *Id.*

[14] *Id.*, § 8AA-61.01(1)(c).

[15] The City of Coral Gables filed an application for certification on September 2, 1993 that became effective on October 2, 1993. The City of West Miami filed an application for certification for certification on November 2, 1993 that became effective on December 2, 1993.

[16] Communications Act of 1934 § 602(10), 47 U.S.C. § 522(10).

[17] *Rate Order, supra*, at 5685, ¶ 71.

[18] Response to Petition, at 3, citing Fla. Const. Art. VIII, § 6(e).

[19] *See* Response to Petition, at 5, citing Dade County, Fla., Code §§ 8A-125, 8AA-3(b).

[20] Response to Petition, at 7-13.

to any municipality in its jurisdiction the power to regulate rates only if the municipality actually decides to exercise that authority and, in turn, exercises that authority in a manner consistent with federal law; otherwise, the County retains the authority to regulate rates in the municipality.[21] The County contends that this approach is consistent with the goals of the 1992 Cable Act. The County argues that Congress intended for all consumers to be protected by regulation when it provided that rates for basic cable service "shall be subject to regulation by a franchising authority or by the Commission."[22] Dade County concludes that, to the extent that a separate review of rates by the County is required for any incorporated municipality, such a review will merely be ancillary to the review of the system-wide data provided to the County by Dynamic in connection with rate regulation in the unincorporated areas, and will not involve any onerous duplication.[23]

7. Finally, Dade County requests that the Commission provide a hearing to allow the parties to present argument on the issues discussed above.

**B. Discussion**

8. The issues in this case are twofold. First, whether Dade County may be certified to regulate the basic service rates of cable systems located in incorporated municipalities within the county that have not filed certification applications.[24] Second, whether Dade County, and specific incorporated municipalities[25] within the county, may both be independently certified to regulate the basic service rates of the same cable system in the same franchise area or whether such simultaneous certification and associated rate regulation constitutes a form of regulation inconsistent with federal standards.

9. With respect to the first issue, we find no conflict in Dade County's certification and regulation with the Commission's rate rules or policies. Dynamic suggests that a conflict exists between the decision of various municipal franchising authorities not to seek certification and not to engage in rate regulation and the County's decision to regulate; the implication, according to Dynamic, is that the Commission should defer to the decisions of the municipalities against regulation. We find, however, no such conflict. The Dade County ordinance permits but does not mandate that authority be delegated to incorporated municipalities. With respect to those municipalities that have not filed certification applications it simply appears that such a delegation of authority has not been accepted and that authority has been left to the County's decision making processes. The County and the incorporated municipalities both qualify as "franchising authorities," under the terms of the 1992 Cable Act.[26] Because our rules require that only "franchising authorities" certify to regulate rates, either the County or the municipalities may appropriately qualify to regulate rates.[27]

10. With respect to the second issue, we conclude that such duplicative certification and regulation is inconsistent with federal standards and should be revised to establish a single certified authority as the franchising authority for purposes of basic service and equipment rate regulation. Dade County states that it enacted its rate ordinance in order to "dovetail" rate regulation into its two tiered franchising system. However, the 1992 Cable Act and our rules do not allow for this type of scheme. The 1992 Cable Act and our rules contemplate the regulation of a cable operator's basic service tier and associated equipment by a single entity, involving one level of initial review and rate-setting.[28] Decisions made at this level may then be appealed to the Commission. Our rules make no provision for states or local governments to make allowable modifications to this regulatory structure. Thus, to the extent that the County's ordinance suggests otherwise, it should be amended to permit a single regulatory body to regulate the basic service rates of each individual system operating in a separate franchise area. Specifically, with regard to the incorporated areas of Dade County, the County must either delegate the authority to regulate rates in the incorporated areas exclusively to the municipalities, exercise the authority itself, or establish a joint authority between the County and the municipalities.[29] The County may not implement a regulatory scheme that results in two regulatory bodies acting independently of each other to concurrently regulate a cable system operating in a single franchise area. The resulting confusion and uncertainty would be contrary to the intent of the regulatory structure contemplated by the 1992 Cable Act.[30]

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[21] Response to Petition, at 6, citing Dade County Ordinance No. 93-120, *supra*, § 1(c).

[22] *See* Communications Act of 1934 § 623(a)(2)(4), 47 U.S.C. § 543(a)(2)(A).

[23] Response to Petition, at 11-12.

[24] Hialeah (FL 0020), Hialeah Gardens (FL 0675), Medley (FL 0429), Miami Springs (FL 0427), Sweetwater (FL 0422), and Virginia Gardens (FL 0428).

[25] Coral Gables (FL 0674), and West Miami (FL 0553).

[26] *See* Communications Act of 1934 § 602(10), 47 U.S.C. § 522(10); *see also Rate Order* at 5685, ¶ 71.

[27] *See* 47 C.F.R. § 76.910.

[28] For example, the Commission's rules provide for the assumption of jurisdiction directly by the Commission and not by the County, as the ordinance provides, where a franchising authority's certification has been denied or revoked. 47 C.F.R. § 76.913. Moreover, the Cable Act and the rate setting rules, Communications Act of 1934 § 623, 47 U.S.C. § 543; 47 C.F.R. §§ 76.922- 943, prescribe a single level of review by the local franchising authority and 47 C.F.R. § 76.944(a) specifically states "[t]he Commission shall be the sole forum for appeals . . . ."

[29] Since the petitions do not challenge regulation in the unincorporated portion of Dade County, we do not address those areas.

[30] With regard to circumstances relevant to the matters at issue, the Commission, in the *Rate Order*, took note that the Massachusetts Community Antenna Television Commission ("MCATC"), a state agency, has the authority under state law to regulate cable rates. *Rate Order* at 5685. Despite the fact that the local governments issue the franchises in Massachusetts, MCATC retains the power to engage in cable rate regulation. *Id.* Therefore, under the 1992 Cable Act, franchising authorities in Massachusetts would be unable to certify that they have the "legal authority" to regulate rates. *Id.* In this regulatory structure, MCATC is considered the governmental entity empowered by state law to regulate rates. *Id.* The difference between rate regulation in Massachusetts and Dade County's regulatory scheme is that under the Massachusetts scheme, there is only one governing body with the authority to regulate rates. Conversely, under Dade County's ordinance, the authority to regulate rates is exercised concurrently by both the County and the municipalities. Thus, Dade County has neither preempted local regulation nor ceded regulation to local franchising authorities

11. The Commission's rules provide that a franchising authority's certification shall be revoked if, after the franchising authority has been given a reasonable opportunity to comment and cure any minor nonconformance, it is determined that state and local laws and regulations are in substantial and material conflict with the statutory requirements of the 1992 Cable Act or the Commission's rules governing rates.[31] A franchising authority's failure to meet any of the three statutory conditions for certification may be grounds for revocation.[32] However, we will remand such cases to the franchising authority with instructions to cure the defect before revoking the certification.[33] The Commission will revoke certification in these cases only if the franchising authority fails to cure the defect in accordance with our remand order.[34] In such cases, the Commission will assume jurisdiction of the basic service rates until the authority becomes recertified.[35] In order to become recertified, the authority must implement the steps recommended by the Commission. The Commission will consider any resubmission made by the franchising authority on an expedited basis.[36]

12. In accordance with the Commission's rules, we will not revoke Dade County's certification without allowing the County a reasonable opportunity to cure its nonconformance with the Commission's regulations.[37] Because no conflicting local rate orders have as yet been issued and because the possibility of harm to the operators resulting from the defective ordinance exists only in theory at this point, we will not revoke Dade County's certification before providing it an opportunity to cure the defect in its ordinance. Therefore, we remand this matter to Dade County to give it an opportunity to take the necessary steps to cure the present defect in its regulatory procedures and to submit any revised ordinance to the Commission within 150 days of the release of this *Order*.[38] The County may incorporate any regulatory scheme it chooses as long as it is consistent with the terms of this *Order*, the 1992 Cable Act and the Commission's rules. Because we are not revoking the County's certification, we will not take over rate regulation of the basic service rates for the incorporated areas of Dade County in the interim period. Dade County's revised ordinance should clearly indicate whether the County, the municipalities or both the County and the municipalities, acting under joint authority, has been granted the authority to certify to regulate rates in the incorporated areas of the County.

## III. REQUEST FOR STAY

### A. Arguments

13. Dynamic has also requested a stay of rate regulation by the County pending the certification of a legally qualified regulatory body.[39] The Commission evaluates petitions for stay under well-settled principles. To support a stay, a petitioner must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[40]

14. Dynamic argues that the ordinance under which Dade County seeks to regulate rates in the incorporated areas of the County creates a duplicative, concurrent regulatory scheme that is clearly inconsistent with the Commission's rules. Second, Dynamic claims that if both Dade County and the municipalities are permitted to regulate their rates in the incorporated areas, Dynamic will be irreparably harmed. Dynamic argues that it will be forced to incur unrecoverable administrative costs in complying with Dade County's duplicative regulatory demands. Dynamic also notes that it could be forced to comply with County-issued orders requiring refunds and/or rate rollbacks. Dynamic claims that the refunds paid to subscribers, or not recovered due to reduced rates, will be irretrievably lost. Third, Dynamic asserts that Dade County itself will not in any way be injured by a stay of its exercise of rate regulation. Dynamic adds that residents of the County will not be harmed because the municipalities will still have the authority to certify to regulate rates in the incorporated areas. Finally, Dynamic asserts that the public interest will be served by the grant of a stay. Dynamic notes that the Commission's rules acknowledge that the decision to exercise rate regulation authority rests with the local franchising authority legally qualified to engage in such regulation. Dynamic claims that, absent a stay, Dade County could interfere with the ability of the municipal franchising authorities to control the rate regulation process within their jurisdictional boundaries. Furthermore, the administrative burdens and confusion that will result if Dade County establishes a duplicative, concurrent rate scheme clearly do not serve the public interest.

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nor created a joint regulatory body between the County and the municipalities. Instead, it has essentially created a system of dual regulation under which both the municipalities and the County are permitted to become independently certified to regulate rates in the incorporated areas.

[31] 47 C.F.R. § 76.914(a)(1).

[32] *Rate Order* at 5699, ¶ 99.

[33] *Id.*

[34] 47 C.F.R. § 76.914(a)(2); *Rate Order* at 5699, ¶ 99.

[35] Communications Act of 1934 § 623(a)(6), 47 U.S.C. § 543(a)(6).

[36] *Rate Order* at 5699, ¶ 99.

[37] 47 C.F.R. § 76.914. *See Third Order on Reconsideration*, MM Dockets 92-266 and 92-262, 9 FCC Rcd 4316, ¶ 55 (1994) (*"Third Recon. Order"*).

[38] Dade County is allowed a reasonable opportunity to comment and to establish a regulatory process consistent with the 1992 Cable Act and the Commission's rules. 47 C.F.R. § 76.914. *Third Recon. Order, supra*. Further, in its discussion the Commission stated that "we will allow a franchising authority to cure any nonconformance with our rules that does not involve a substantial or material regulatory conflict before we will revoke its certification and assume jurisdiction." In Dade County's Response to Petition, the County requested that the Commission, should it find a defect in Dade County's Rate Ordinance, allow the County no less than 120 days to cure the defect. Dade County bases its request on the amount of time required to amend the County's ordinance. The County estimates that it will require 30 days to place the item on the agenda, followed by placement of the item on public notice, and 6 weeks to hold two hearings.

[39] The Commission's rules allow cable operators to request a stay of rate regulation pending review of non-effective competition petitions for reconsideration that are not based on effective competition. *See* 47 C.F.R. § 76.911(c)(2).

[40] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

15. Dade County argues that Dynamic's request for stay should be denied because Dynamic has failed to satisfy each of the four conditions required for a stay. Dade County argues that Dynamic's fears of unwarranted duplication of review are not justified. Dade County asserts that when the County conducts its administrative review of the rates affecting Dynamic subscribers located in the unincorporated areas of the County, it almost necessarily will be determining the rates for the similarly situated subscribers residing in the various incorporated areas. The County claims that Dynamic's claim of irreparable harm, based on administrative costs and possible refunds or rollbacks, also are unwarranted. The County argues that it is well settled that "economic loss does not, in and of itself, constitute irreparable harm."[41] The County adds that this is particularly true where Dynamic may appeal any rate order to the Commission to ensure that any possible refund or rate roll-back conforms to the Commission's guidelines. The County argues that rate regulation is not intended to protect the County itself, but is instead intended to protect cable subscribers. Dade County argues that it is cable subscribers who will suffer if Dynamic succeeds in obtaining a stay and thereby escapes the rate regulatory review process. Finally, Dade County asserts that a stay would harm the public interest because it would deny cable subscribers in the County the protection of cable rate regulation.

**B. Discussion**

16. After evaluating Dynamic's request for stay under the aforementioned four part test,[42] we find that Dynamic has not established that a stay of rate regulation by Dade County in the incorporated areas of the County is necessary. Dynamic has failed to adequately demonstrate that it will suffer irreparable harm if a stay is not granted. Dynamic points to the imposition of administrative costs and the possibility of rate rollbacks and refunds in attempting to establish that it will suffer irreparable harm if a stay of the County's rate regulation is not granted. However, mere economic loss, in and of itself, does not necessarily constitute irreparable harm.[43] Moreover, until, if ever, actual conflicting rate orders have been issued by both the County and a municipality with regard to the same franchise area, the possibility of harm to Dynamic is too speculative. In addition, we believe the public interest requires the request for stay be denied. Cable subscribers in Dade County should continue to receive the benefits of rate regulation while the County implements appropriate jurisdictional changes to its rate ordinance. We note that no conflicting orders have been ordered to date. None of the certified local franchising authorities have taken any action that suggests that they intend to issue orders. Because Dynamic has not satisfied each prong of the four part test for the granting of stays, we deny its request for stay.

17. Because we were able to issue a decision regarding Dade County's certification based on the pleadings filed by all the concerned parties, we dismiss Dade County's request for hearing in this proceeding.

**IV. ORDERING CLAUSES**

18. Accordingly, IT IS ORDERED that the petition for revocation filed by Dynamic Cablevision of Florida, Ltd. with respect to the regulation of basic cable subscriber rates by Metropolitan Dade County in the cities of Hialeah, Coral Gables, Hialeah Gardens, Medley, Miami Springs, Sweetwater, Virginia Gardens, and West Miami, Florida IS GRANTED to the extent indicated in paragraphs 11 through 13 above and IS OTHERWISE DENIED.

19. IT IS FURTHER ORDERED that the request for stay filed by Dynamic Cablevision of Florida, Ltd. with respect to rate regulation IS DENIED.

20. IT IS FURTHER ORDERED that Dade County SHALL HAVE AN OPPORTUNITY to cure the defects in its certifications in conformance with the terms of this *Order*, and SHALL SUBMIT a copy of any revised rate ordinance or certification WITHIN ONE HUNDRED AND FIFTY (150) DAYS from the release of this *Order*.

21. IT IS FURTHER ORDERED that the request for hearing filed by Metropolitan Dade County IS DENIED.

22. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[41] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).
[42] *See* ¶ 16, *supra*.
[43] *See Wisconsin Gas Company v. FERC*, 758 F.2d 669 (D.C. Cir. 1985).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-241**

In re Applications

| | |
|---|---|
| DARRELL BRYAN | File No. BPH-920109MA |
| SBH PROPERTIES, INC. | File No. BPH-920123MD |

For Construction Permit for a
New FM Station on Channel 276A
in Tusculum, Tennessee

**Appearances**

*J. Richard Carr, Esq.* on behalf of Darrell Bryan; *Timothy K. Brady, Esq.* on behalf of SBH Properties, Inc.; and *Robert A. Zauner, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK**

**Issued: July 13, 1995; Released: July 19, 1995**

**PRELIMINARY STATEMENT**

1. The captioned applications were designated for comparative hearing by *Hearing Designation Order ("HDO")*, released August 31, 1993, 8 FCC Rcd 6296 (Chief, Audio Services Division). The following issues were designated for comparative hearing:

> A) To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> B) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

2. SBH Properties, Inc. ("SBH") filed a Motion to Enlarge Issues Against Darrell Bryan ("Bryan") on February 15, 1994. By Public Notice dated February 25, 1994, the Commission suspended and held in abeyance the processing of applications and the adjudication of hearing proceedings which involve a comparative analysis.

3. By *Memorandum Opinion and Order*, FCC 94M-296, released April 25, 1994, the SBH motion to enlarge was granted in part and the issues in this proceeding were enlarged as follow:

> To determine whether Bryan is presently financially qualified;
>
> To determine whether Bryan was financially qualified at the time it so certified;
>
> To determine whether Bryan's financial certification was false; and
>
> To determine in light of the evidence adduced under the foregoing issues the effect on Bryan's basic qualifications.

4. A hearing session on the added financial issues was held on July 26, 1994 and the record on the financial issues was closed. The record was later reopened to admit two additional exhibits and again closed.

5. Subsequently, on June 19, 1995, the above-named applicants entered into a settlement agreement wherein SBH agreed to have its application dismissed with prejudice in return for certain monetary consideration and consulting services. The settlement agreement was approved and the SBH application was dismissed by *Memorandum Opinion and Order*, FCC 95M-159, released July 17, 1995. In as much as only the financial qualification/false certification issues specified against Bryan remain to be resolved the case is ripe for *Initial Decision*.

**FINDINGS OF FACT**

**Bryan's Financial Qualification**

6. Darrell Bryan consulted his attorney, Rick Hayes, in order to initiate an application. Mr. Hayes provided Mr. Bryan with a sample budget to use as an outline in assembling a list of construction and operating costs. The sample budget included listings of equipment and construction costs as well as operating costs for three months (Bryan Ex. 8, p. 1).

7. Mr. Bryan also reviewed catalogs and other materials from equipment companies that he had on hand in order to obtain prices for various items of equipment. He relied extensively on the 1990 catalog from Broadcast Supply West ("BSW") of Tacoma, Washington (see excerpts from catalog in Bryan Ex. 8, pp. 5-13; Tr. 32). The other catalogs reflected similar prices (Bryan Ex. 8, p. 1).

8. After reviewing the BSW catalog and seeing prices for various items of equipment, Mr. Bryan contacted that company by telephone, and was advised by BSW that if he purchased several items of equipment, the merchandise would be discounted from 20 percent to 30 percent. BSW prices were used and included prices for a Gentner remote control, the audio console, the distribution amp, an 8 foot equipment rack, carts, an audio processor and the STL transmission line (Bryan Ex. 8, p. 1).

9. Bryan also relied on prices obtained from Hall Electronics of Charlottesville, Virginia from whom he had made prior purchases. Hall Electronics gave him a price for the FM transmitter and for a 300-foot tower. He also relied on Hall for his price for the main antenna and transmission line, in addition to incorporating their recommendation of budgeting used equipment for the STL package, a pair of parareflector antennas and an ITC Delta Recorder. In compiling his various costs, he inadvertently omitted the price for an FM modulation monitor which is currently $1,450 (Bryan Ex. 8, p. 1; Tr. 34, 43; Bryan Ex. 9, p. 10).

10. Having been informed that exact costs for the antenna would be based on the configuration of the equipment which would be determined by an engineer prior to beginning construction, Mr. Bryan incorporated a price for a six kilowatt transmitter, and, a price for a six-bay antenna

into his budget to ensure that the cost of any size antenna would be covered. The record shows that the proposed six kilowatt transmitter will work with either a four-bay or six-bay antenna (Bryan Ex. 9, p. 3). Mr. Bryan based his price for IGM automation equipment on a brochure he had obtained from that company (Bryan Ex. 8, p. 2.).

11. Mr. Bryan took into consideration that he already had on hand an extra EBS monitor, and an extra 5kw Kubota generator that were not in use (Bryan Ex. 8, p. 2; Tr. 41). He budgeted a price for a transmitter building to be built by a local contractor. He based his cost estimate for studio furniture on a local source that could build any unit needed to hold studio equipment (Tr. 45). Bryan's estimate for office furniture took into consideration the fact that he had unused tables, desks, chairs and typewriters that could be used at the FM station which he had personally purchased and were in storage WSMG (Tr. 46). Based on the foregoing process, Mr. Bryan arrived at an initial equipment and construction budget of approximately $99,000 (Bryan Ex. 8, p. 2).

12. In calculating the 90-day operating costs, Mr. Bryan relied on his own experience acquired operating radio station WSMG(AM) in the same market. Bryan estimated the cost for electricity (Tr. 81); expenses for telephone services (Tr. 86-87); for health insurance (Tr. 88); and site purchase payments (Bryan Ex. 8, p. 2). He included two payments for loan repayment which included the payment of both principal and interest based on the interest rate in effect at that time (Bryan Ex. 6, p. 1).

13. Mr. Bryan arrived at a total construction and operating cost of $136,482.88 and then added an additional $38,517.12 to cover any future cost increases, additional equipment, engineering or legal expenses to arrive at the total loan amount of $175,000. All of the legal and engineering expenses incurred up to July 6, 1994 have been paid (Bryan Ex. 8, pp. 2-3).

14. Richard Mertz, a consulting engineer, testified on the current cost of constructing Bryan's proposed station and prepared an updated equipment cost estimate. The equipment specifications in his estimate were determined after review of Bryan's FCC application. Bryan's original equipment budget did not provide brand names for all of the listed items of equipment. In his new estimate, Mr. Mertz provides a detailed list of equipment with brand names. Additionally, the Mertz estimate specifies only new equipment even though the original Bryan estimate had specified a few used items. Mr. Mertz included in his new estimate the costs supplied by Bryan for a generator and by Walter Stone for a transmitter building and tower.

15. To rebut SBH's counter that the proposed station cannot be built within the funds available in Bryan's budget, Mr. Mertz prepared two detailed estimates based on all new equipment at current prices. The only difference between the two estimates is that one includes the cost of a 7/8 inch transmission line and the other includes the cost of a 1 5/8 inch transmission line. The detailed estimates prepared by Mertz demonstrate that the proposed Bryan station can be built today using all new equipment for a cost ranging from only 3.28 percent to 5.35 percent over Bryan's 1991 estimates (Bryan Ex. 9).

16. Mr. Bryan contacted Stan Puckett, President of Greene County Bank for the funds necessary for construction and operation for the initial 90 days. As Greene County Bank had already extended a $300,000 loan to Mr. Bryan when he purchased his AM radio station in 1989, he was an established customer of the bank and they were familiar with his finances, his operation of the AM station, and his credit history on the $300,000 loan. His financial statement and biography were already on file at the bank (SBH Ex. 7, pp. 30-31).

17. Mr. Puckett testified that he informed Mr. Bryan that repayment would be interest-only for the first year with payments being made quarterly based on a 15-year amortized repayment at 1.5 percent above prime (Bryan Ex. 6, p. 1; Bryan Ex. 8, p. 3). He also stated that any decision to incorporate the station would trigger a requirement of pledge of stock (Bryan Ex. 8, p. 3). The bank's Executive Committee had met and not only authorized the issuance of the December 12, 1991 commitment letter but approved the loan to Mr. Bryan (Bryan Ex. 6, p. 2; Bryan Ex. 8, p. 3). Mr. Bryan subsequently obtained a letter from Mr. Puckett in September 1993 confirming the continued availability of the loan and clarifying that the pledge of stock would only be required in the event of incorporation (Bryan Ex. 6, p. 2; Bryan Ex. 8, p. 3).

18. Mr. Puckett, the bank president, testified that continued ownership of WSMB(AM) by Mr. Bryan was not of concern to the bank, and the fact that the bank has a pledge of stock of Burley Broadcasters, Inc. in connection with the 1989 loan would not bar a sale of WSMG(AM). Burley Broadcasters, Inc. is wholly owned by Mr. Bryan. Mr. Puckett stated that the proceeds of any sale would be applied to the payment of the balance on the 1989 loan (Bryan Ex. 6). Mr. Puckett testified that if the proceeds of a sale of WSMG(AM) did not completely retire the WSMG loan, which as of July 1, 1994 was $210,000, any shortfall would be folded into the FM station loan and handled under the new note (Bryan Ex. 7, p. 28; Bryan Ex. 6., p. 1). Since only $210,000 is owed on the AM station loan, a sale of the AM station for less than half of Mr. Bryan's valuation, would provide sufficient funds to completely retire the AM station loan (Bryan Ex. 6, p. 1). In addition to the pledge of stock, Greene County Bank currently has a lien on the equipment, furniture and fixtures used at WSMG (SBH Ex. 10). Any equipment or furniture retained by Bryan after the sale of the AM station to be used at the new FM station would fall under the new bank lien that would apply to any acquired assets under the FM loan (Tr. 105-106); See December 12, 1991 commitment letter attached to SBH Ex. 7. Since legal and engineering expenses have been paid by Bryan on an ongoing basis, the full amount of the $175,000 is still available to Bryan for construction and operation (Bryan Ex. 6, p. 2; Bryan Ex. 8, p. 3). Mr. Puckett made it clear that the bank had not simply issued a letter to consider a loan at a later date but had actually approved the loan to Bryan and that "[i]n order to draw the full amount of the loan Mr. Bryan only has to come in to the bank and show that he has received a permit to build the new FM station and sign the note and the loan documents." (Bryan Ex. 6, p. 2).

## CONCLUSIONS OF LAW

19. The record establishes that Bryan obtained a sample budget from his attorney and studied catalogs that he had on hand at his AM station. He reviewed a catalog from an equipment company, Broadcast Supply West, which indicates in its catalog that it discounts equipment from list prices. Mr. Bryan then telephoned BSW as customers are instructed to do in the catalog and applied the discounts in arriving at a price for various items of equipment. He arrived at the price for the automation equipment from a

brochure that he had received from the manufacturer, IGM. He telephoned Hall Electronics and obtained prices for the transmitter and tower. He also took their recommendation and obtained a quote from them for three items of used equipment, and, included a price for a six bay antenna since he was unsure at that time exactly how many bays would ultimately be needed. The $800 cost of studio furniture in the budget was obtained from a local source who would build what was needed; the $500 cost for office furniture took into consideration the fact that he had on hand various office furniture that could be used at the FM station. After pricing the equipment that would be needed, Mr. Bryan arrived at a total cost estimate of approximately $99,000 for equipment.

20. SBH has asserted that Bryan has underestimated his costs: SBH submitted equipment sales proposals from equipment companies in an effort to show that Bryan will have to spend considerably more. The SBH estimates are attached to a statement by Mr. William Seaver who requested them from Continental, Harris and RF Specialties. Seaver has no engineering background; he asked for proposals for a 6 kilowatt station with a 300 foot tower utilizing two-bay, three-bay and four-bay antennas. He acknowledged that the estimates were simply run off from proposals on computer. Furthermore, the detailed estimates prepared by Mertz demonstrates that the proposed Bryan station can be built today using all new equipment for a cost ranging from only 3.28 percent to 5.35 percent over Bryan's 1991 estimates. Such cost increases would normally be expected as a result of inflation over a period of two and half years.

21. In compiling operating costs, Mr. Bryan relied on his experience as the owner/operator of WSMG(AM) in the same market who is familiar with employee salaries and other radio station expenses such as electric power, telephone, etc. Mr. Bryan's total estimate for operating costs was $37,993.88 (SBH Ex. 15) which is more than $11,500 more than SBH allocated for its three month's operating expenses. After compiling both construction and operating costs, Mr. Bryan added a surplus of approximately $38,000 and obtained a loan approval from the bank for $175,000. If the highest equipment and construction cost presented by Mr. Mertz of $104,051.97 (Bryan Ex. 9, p. 12) is added to Bryan's three month operating costs total of $37,993.88 (without deleting the site and office payments), the total cost to Bryan to construct and operate at the present time is $142,054.85, resulting in an available surplus of $32.954.15.

22. Bryan is relying on a loan commitment from Greene County Bank. The record establishes that all of the factors discussed *Scioto Broadcasters,* 5 FCC Rcd 5158 (Rev. Bd. 1990) are present in the Greene County Bank letter. Moreover, Bryan's source of funds, Greene county Bank, did not just provide a letter to Bryan; the bank's president, Stan Puckett, testified that Bryan's loan request had been placed on the agenda of the bank's Executive Committee and had actually been approved prior to the issuance of the December 12, 1991 letter. Mr. Puckett testified that in order to draw the full $175,00, Bryan only has to show that he has received the FM construction permit and execute the loan documents. Bryan has established that $175,000 was available to him from Greene County Bank at the time that he certified and that such funds are still available.

23. In light of the foregoing the financial and false certification issues ARE RESOLVED in Bryan's favor.

## ULTIMATE CONCLUSIONS

24. SBH's application has been dismissed pursuant to a settlement agreement entered into by SBH and Bryan. Bryan the sole remaining applicant has been found financially and otherwise qualified to be a Commission licensee. There is no impediment to the grant of his application.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Darrell Bryan (File No. BPH-920109MA) IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-52**

In the Matter of

Amendment of Section 73.202(b), RM-8604
Table of Allotments,
FM Broadcast Stations.
(Roann, Indiana)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: July 13, 1995; Released: July 20, 1995**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 10 FCC Rcd 4907 (1995) (*"Notice"*), issued in response to a petition filed on behalf of Roann Broadcasting ("petitioner") proposing the allotment of Channel 270A to Roann, Indiana, as that community's first local aural transmission service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. In view of the petitioner's stated interest in providing a first local aural transmission service to Roann, we will allot Channel 270A to that community, as requested.

3. As stated in the *Notice*, Channel 270A can be allotted to Roann consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (2) of the Commission's Rules, provided the transmitter is located at least 1.1 kilometer (0.7 mile) north of the community at coordinates 40-55-18 and 85-55-30. Additionally, as Roann is located within 320 kilometers (199 miles) of the Canadian border, concurrence of that Government to this proposal was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 5, 1995,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Roann, Indiana, as follows:

| City | Channel No. |
|---|---|
| Roann, Indiana | 270A |

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 270A at Roann, Indiana, will open on **September 5, 1995** and close on **October 6, 1995.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 270A at Roann, Indiana, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Disposition of Non-Nationwide
220-222 MHz Applications

**ORDER**

**Adopted: July 10, 1995; Released: July 21, 1995**

By the Chief, Land Mobile Branch, Licensing Division:

The Wireless Telecommunications Bureau has acted upon all applications for frequencies in the 220-222 MHz Band filed pursuant to PR Docket 89-552. The Bureau acted upon all applications submitted from Day 1 through Day 23 and granted all applications for which spectrum was available. The granted licenses are contained in the Commission's database. License records are available for review at the Wireless Telecommunications Bureau's Office of Operations - Gettysburg or this information may be obtained from International Transcription Service, the Commission's copy contractor. On-line public access to the database can also be obtained through Interactive Systems, Inc., the Commission's database contractor. Inasmuch as no spectrum was available for the remainder of the applications, those applications are hereby **Dismissed** and will not be returned.

FEDERAL COMMUNICATIONS COMMISSION

Terry L. Fishel
Chief, Land Mobile Branch

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ALABAMA PUBLIC SERVICE COMMISSION
and
MISSISSIPPI PUBLIC SERVICE COMMISSION
Complainants,

v. File No. E-95-20

OPERATOR COMMUNICATIONS, INC., d/b/a
ONCOR COMMUNICATIONS, INC.
Defendant.

**ORDER**

**Adopted: July 14, 1995; Released: July 21, 1995**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 28, 1995, the Alabama Public Service Commission and the Mississippi Public Service Commission (Complainants) jointly filed a formal complaint against Operator Communications, Inc., d/b/a Oncor Communications, Inc. (Oncor), directed against its rates for operator services. On April 12, 1995, Oncor filed its answer and a cross-complaint. Following a status conference of counsel for the parties and the staff on June 22, 1995, Complainants requested dismissal of their complaint without prejudice.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C.§ 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint IS DISMISSED WITHOUT PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and Investigations Branch
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

INTERNATIONAL TELECHARGE, INC.,
Complainant,

v. File No. E-92-74

AMERITECH CORPORATION,
Defendant.

**ORDER**

**Adopted: July 13, 1995; Released: July 21, 1995**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 1, 1992, International Telecharge, Inc. filed the above-captioned complaint against Ameritech Corporation (Ameritech) seeking to recover damages from Ameritech for alleged violations of the Commission's rules in connection with Ameritech's computation and assessment of terminating carrier common line ("CCL") charges. On July 5, 1995, the parties filed a joint motion to dismiss the complaint stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and Investigations Branch
Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

Alta Gulf FM, Inc.
(Assignor)

and File No. BAL-950314GL

Citicasters Co.
(Assignee)

For Assignment of License of
WTBT(FM), New Port Richey, Florida

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 13, 1995** **Released: July 21, 1995**

By the Commission:

1. The Commission has before it the above-captioned application for assignment of the license of station WTBT(FM), New Port Richey, Florida (formerly WGUL-FM), from Alta Gulf FM, Inc. ("Alta") to Citicasters Co. ("Citicasters") and a related request for waiver of 47 C.F.R. §73.3555(c), the Commission's one-to-a-market rule.[1] Citicasters is presently the licensee of CBS - affiliated VHF television station WTSP-TV, St. Petersburg, Florida and FM station WXTB(FM), Clearwater, Florida. Because the Grade A contour of WTSP-TV encompasses all of New Port Richey, grant of the above-captioned application requires waiver of the one-to-a-market rule.[2] *In re Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules ("Second Report and Order")*, 4 FCC Rcd 1741 (1989), *recon. granted in part and denied in part ("Second Report and Order Recon.")*, 4 FCC Rcd 6489 (1989). Citicasters' request is unopposed. As set forth below, we will grant the waiver request and the assignment application.

2. Citicasters bases its waiver request on the one-to-a-market waiver standards adopted in the *Second Report and Order*. Under these criteria, the Commission presumptively favors waiver requests involving (1) station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees after the proposed combination; and (2) "failed" stations (stations that have not been operating for a substantial period of time or that are involved in bankruptcy proceedings). Other waiver requests are evaluated on a more rigorous case-by-case basis. 47 C.F.R. § 73.3555, note 7. While Citicasters's waiver request meets the top 25 market/30 voice standard,[3] it nevertheless must be reviewed under the case-by-case standard because, as noted, the proposed assignment of license also requires a showing under our local radio ownership rules.[4] Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities such as the economies of scale, cost savings and programming and service benefits; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented. *See Second Report and Order*, 4 FCC Rcd at 1753-54.

3. *Benefits of Joint Operation*. Citicasters contends that the joint operation of WTBT(FM), WTSP-TV and WXTB(FM) will result in savings in excess of $607,000 per year. It asserts that these savings will result from consolidation of staff, management, and administrative functions and from consolidation of studio and technical facilities. Specifically, Citicasters estimates that of the total savings, $34,000 would come from joint news gathering, $78,000 from savings in office space, transmitter site costs and equipment savings, and $25,000 from advertising volume discounts. It further estimates that consolidation of administrative functions would save in excess of $65,000 per year. Although it could not quantify exact amounts, Citicasters also estimates that approximately $200,000 in savings (in excess of the $607,000) may be achieved by centralizing

[1] Section 73.3555(c) of the Commission's rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a commonly-owned television station, or, conversely, if the Grade A contour of a television station encompasses the entire community of license of a commonly-owned AM or FM station. *See* 47 C.F.R. §73.3555(c).

[2] Because the principal community contours of WXTB(FM) and WTBT(FM) overlap, Citicasters must also meet the requirements of the local radio ownership rule found in Section 73.3555(a) of the Commission's rules. *See* 47 C.F.R. §73.3555(a)(1). Citicasters certifies that there are at least 15 radio stations whose contours overlap the contours of the proposed commonly-owned stations. Because over 50 percent of principal community contour overlap of same service stations WXTB(FM) and WTBT(FM) occurs within the Tampa-St. Petersburg radio metro market, as defined by Arbitron, Inc., Citicasters supplies audience share data from the most recent Arbitron survey available from that market at the time the instant application was filed. *See* 47 C.F.R. §73.3555(a)(3)(iii). Those data show that the combined audience share of WXTB(FM) and WTBT(FM) in the metro market is 12 percent, and therefore below the 25 percent audience share limit set forth in the rule. Grant of the application is therefore consistent with the local radio ownership rules.

[3] The Tampa-St. Petersburg-Clearwater, Florida media market is the country's sixteenth largest and will contain 43 separate broadcast "voices" following Citicasters's proposed acquisition of WTBT(FM).

[4] *See In re Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6394, n.40 (1992); *see also Moosey Communications, In c.*, 8 FCC Rcd 5247 (1993)(consideration of one-to-a-market waivers under the case-by-case standard still appropriate where new radio-TV combinations are created, pending the possible revision of the one-to-a-market rule in the outstanding TV ownership proceeding in MM Docket 91-221).

certain management services such as business affairs planning, marketing, audience research, and negotiation of labor contracts.

4. Citicasters asserts that the combined operation of WTSP-TV, WXTB(FM) and WTBT(FM), would result in significant public service benefits. These include enhanced news gathering for WTBT(FM) by the use of the news staffs and services already employed by Citicasters in the Tampa Bay area. In addition, WTBT(FM) will have access to WTSP-TV's meteorological staff and will become part of the WTSP-TV/WXTB(FM) hurricane coverage cooperative, thereby expanding the reach of this important weather service. Furthermore, WTBT(FM) will become affiliated with the ABC Radio Network, Metro Traffic, and the AP Wire Service. Finally, Citicasters asserts that it has a proven record of public service in the Tampa Bay area. In addition to numerous public service announcements (WXTB airs ten second PSA's on the hour 20 times a day; WTSP-TV broadcasts between 8,500 to 10,000 PSA's annually), Citicasters' specifies a myriad of public service and children's programs and a multitude of community support projects, for which it has received many awards.

5. *Other Media Outlets/Type of Facilities.* Citicasters does not own any broadcast stations or other media interests in the Tampa-St. Petersburg-Clearwater, Florida market other than WTSP-TV and WXTB(FM). WTSP-TV is a VHF facility operating on Channel 10 with 316 kW effective radiated power ("ERP") and an antenna height of 454 meters above average terrain ("HAAT"). WXTB(FM) is a C-1 station operating on Channel 250 (97.9 MHz) with 100 kW ERP and an antenna height of 183 meters HAAT. WTBT(FM) is a Class A station operating on Channel 288 (105.5 MHz) with 6.0 kW ERP and an antenna height of 87 meters HAAT.

6. *Economic Status.* Citicasters' states that it is not relying on the current economic status of the stations involved in the combination, the fourth factor, in support of its waiver request. However, it notes that the Commission has previously indicated that "[n]ot all of the factors mentioned will be relevant in every case." *See Second Report and Order Recon.*, 4 FCC Rcd at 6491. *See also, Great American Television and Radio Co.*, 4 FCC Rcd 6347, 6350 n.5 (1989).

7. *Competition and Diversity in the Market.* The final factor relates to the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately-owned and operated "voices" in the market, and the presence of cable and non-broadcast media. As to the number of broadcast stations, the Commission has held in the context of a one-to-a-market waiver, it will consider the "relevant TV metro market for radio stations and the relevant ADI (Area of Dominant Influence) TV market for TV stations." *See Second Report and Order,* 4 FCC Rcd at 1760, n.101. Citicasters notes that the Tampa-St. Petersburg-Clearwater television ADI is ranked 16th in the country. Citicasters further represents that there are 12 television stations operating in the ADI and 24 AM and 20 FM stations operating in the TV metro market. It further represents that these 56 stations are owned and operated by 43 different "voices." Citicasters additionally states that a total of eight daily newspapers and 33 weekly newspapers are published within the television ADI and further asserts that cable penetration in the Tampa-St. Petersburg Designated Market Area is 69%.

8. *Discussion.* In evaluating a request for waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *See Second Report and Order Recon.*, 4 FCC Rcd at 6491. We conclude that Citicasters' showing in support of a waiver of the one-to-a-market rules is consistent with the public interest and would not have an adverse effect on diversity and competition in the Tampa-St. Petersburg-Clearwater, Florida market. Citicasters has shown that joint operation of WTBT(FM), WXTB(FM), and WTSP-TV will create efficiencies resulting in significant cost savings and the potential for enhanced programming and service benefits. Specifically, WTBT(FM) will have use of the extensive news gathering capacity employed by Citicasters in the Tampa Bay area and will become part of the licensee's audio hurricane coverage cooperative, thereby improving WTBT(FM)'s ability to provide important weather information for this hurricane-prone area. WTBT(FM) will also become affiliated with the ABC Radio Network, Metro Traffic, and the AP Wire Service.

9. Moreover, Citicasters demonstrates that the proposed combination will not create any undue concentration of ownership or control of the broadcast media in the Tampa-St. Petersburg-Clearwater market, which comprises the country's sixteenth largest ADI. Following the proposed acquisition of WTBT(FM), the market will be served by 44 radio stations and 12 television stations. Those 56 broadcast outlets will be owned and operated by 43 separate entities. Other "voices" in the market include eight daily newspapers, 33 weekly newspapers, and cable television, which has a penetration rate of 69 percent. Citicasters will not own any media interests in the market other than WTSP-TV, WXTB(FM) and WTBT(FM). Furthermore, we find that the proposed combination does not present issues of market concentration inconsistent with the public interest given the highly competitive environment in the Tampa-St. Petersburg-Clearwater market. Thus, we are persuaded that the public benefits of common ownership and joint operation of WTSP-TV, WXTB(FM), and WTBT(FM) outweigh any negative effect on diversity and competition in the Tampa-St. Petersburg-Clearwater market that the combination might engender.[5]

10. Accordingly, IT IS ORDERED, That the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(c), IS HEREBY GRANTED, and, having found the parties thereto otherwise qualified, the application for assignment of license (BAL-950314GL) of WTBT(FM), New Port Richey, Florida, from Alta Gulf FM, Inc. to Citicasters Co. IS HEREBY GRANTED.

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[5] Although the stations involved in the transaction are not experiencing financial difficulties, as Citicasters notes, the Commission has stated that all five factors in the case-by-case analysis may not be relevant in every case. *See Second Report and Order Recon.*, 4 FCC Rcd at 6491. Moreover, although the television and radio facilities to be commonly owned are not insubstantial, they do not present a risk of dominating the relevant market.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-110**

In the Matter of

Amendment of Section 1.420(f)
of the Commission's Rules
Concerning Automatic Stay of
Certain Allocations Orders

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: July 10, 1995; Released: July 21, 1995**

By the Commission:

**Comment Date: August 28, 1995**
**Reply Comment Date: September 12, 1995**

## I. INTRODUCTION

1. We initiate this proceeding on our own motion, pursuant to Section 1.3 of the Commission's rules, to improve Commission procedures governing proposals to amend the FM Table of Allotments and the Television Table of Allotments. Specifically, we propose to delete that portion of Section 1.420(f) of our rules, 47 C.F.R. § 1.420(f), which provides for an automatic stay, upon the filing of a petition for reconsideration, of any Commission order modifying an authorization to specify operation on a different channel. The purpose of this proposed amendment is to remove an apparent incentive for the filing of petitions for reconsideration that are largely without merit and to expedite provision of expanded service to the public.

## II. DISCUSSION

2. Section 1.420(f) provides, in pertinent part:

> ... The filing of a petition for reconsideration of an order modifying an authorization to specify operation on a different channel shall stay the effect of a change in the rules pending action on the petition.

3. The automatic stay provision applies to proposals to amend the TV or FM Tables of Allotments where the Commission has modified the authorization of the petitioner or another licensee or permittee to specify operation on a different channel. The provision has been applied both to situations where the petitioner's own authorization is being modified to operate on a different channel, and to situations where the authorization of a licensee or permittee other than the petitioner must be modified to a different channel in order to accommodate a proposed allotment change. In the latter situation, the licensee or permittee whose authorization could be modified is notified of the pending proceeding and ordered to show cause, if any, why the modification should not be approved.[1]

4. Although Section 1.420(f) refers only to petitions for reconsideration, the staff has also applied the automatic stay to orders challenged by applications for review.[2] Our proposal to delete the automatic stay provision for petitions for reconsideration would also eliminate automatic stays in the context of applications for review.

5. The automatic stay was adopted by the Commission in 1975 as part of a provision that requires service of petitions for reconsideration in proceedings for amendment of the FM and TV Tables of Allotments on any licensee or permittee whose authorized frequency could be changed. In addition to the automatic stay provision cited above, Section 1.420(f) provides:

> Petitions for reconsideration and responsive pleadings shall be served on parties to the proceeding and on any licensee or permittee whose authorization may be modified to specify operation on a different channel, and shall be accompanied by a certificate of service...[3]

Thus, it is apparent that the automatic stay was intended to help ensure that affected parties have the opportunity to comment before proposed modifications to their authorizations become effective.

6. Our intent in proposing to delete the automatic stay provision is to discourage parties from filing meritless petitions for reconsideration or applications for review that delay implementation of improved broadcast service. It is our experience that parties increasingly are filing challenges to approvals of their competitors' proposals to improve service, thereby triggering the automatic stay. Only a very small percentage of these petitions or applications for review are ultimately successful. The automatic stay prohibits licensees from constructing modified facilities authorized by the Commission until final resolution of any outstanding petition for reconsideration or application for review,[4] or until the stay is lifted. The automatic stay provides an incentive for parties to challenge agency approval of a competitor's modification proposal simply to forestall institution of new competitive service. These petitions cause unjustifiable expense for parties and absorb valuable staff resources that might otherwise be directed to resolution of new proposals to improve broadcast service.

7. The automatic stay provision can result in substantial delay in commencement of construction and provision of expanded service to the public. Elimination of the automatic stay would facilitate implementation of improved service to licensee communities, thereby promoting more efficient use of broadcast spectrum and resulting in significant public interest benefits. Because Section 1.420(f) will continue to require that petitions for reconsideration be

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1 *See* 47 U.S.C. § 316(a); 47 C.F.R. § 1.87.
2 *See Arlington, TX*, 6 FCC Rcd 2050, 2051 n.2 (1991).
3 47 C.F.R. § 1.420(f).
4 *See, e.g., Arlington, TX, supra* n.2 .

served on any licensee or permittee whose authorization could be modified, the rights of these interested parties to be affirmatively informed of actions potentially affecting their interests will continue to be protected.

8. Elimination of the automatic stay, while allowing licensees to commence construction and operation of their modified facilities, would not prejudice final resolution of any challenges to the initial staff decision. Licensees who proceed, where feasible, to construct and operate new facilities in instances in which a petition for reconsideration or application for review is pending bear the risk of an adverse final decision, and must take whatever steps are necessary to comply with the final order. Moreover, the Commission retains the authority to impose a stay in individual cases where circumstances warrant.[5]

9. We propose both to eliminate the automatic stay in prospective cases, and to lift the stay with respect to any petitions for reconsideration or applications for review pending as of the effective date of the Report and Order in this proceeding. We believe that lifting the stay in pending cases will further our objective of expediting provision of improved service to the public. We invite comment on this second aspect of our proposal in particular, as well as on our general proposal to eliminate the automatic stay.

## III. ADMINISTRATIVE MATTERS

10. *Ex Parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

11. *Comment Information.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **August 28, 1995** and reply comments on or before **September 12, 1995.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

12. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document, set forth in the Appendix hereto. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.*, (1981)).

13. *Additional Information.* For additional information regarding this proceeding, contact Kim Matthews, Mass Media Bureau, Policy and Rules Division, (202)739-0774.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX

### Initial Regulatory Flexibility Analysis

**I. Reason for Action:** This proceeding was initiated to improve Commission procedures governing proposals to amend the FM and TV Tables of Allotments.

**II. Objectives of the Action:** The actions proposed in the *Notice* are intended to reduce the workload in the Allocations Branch of the Policy and Rules Division of the FCC's Mass Media Bureau by eliminating an apparent incentive to challenge agency approval of another station's modification proposal.

**III. Legal Basis:** The proposed action is authorized under sections 4 and 303 of the Communications Act of 1934, as amended. 47 U.S.C. §§ 154, 303.

**IV. Reporting, Record-keeping and Other Compliance Requirements:** None.

**V. Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rule:** None.

**VI. Description, Potential Impact and Number of Small Entities Involved:** Approximately 11,000 existing television and radio broadcasters of all sizes may be affected by the proposals contained in this *Notice*.

**VII. Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** The proposals contained in this *Notice* do not impose additional burdens on small entities.

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth above. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in ac-

[5] *See* 47 C.F.R. §§ 1.102(b), 1.106(n), and 1.115(h).

cordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| Radio Group of | File Nos. |
| Grand Rapids, Inc. | BR-890601WK |
| | BRH-890601WJ |

For Renewal of License of
Stations WLAV/WLAV-FM
Grand Rapids, Michigan

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 14, 1995; Released: July 21, 1995**

By the Commission:

1. The Commission has under consideration: (1) our decision in *Liggett Broadcast, Inc.*, 7 FCC Rcd 4520 (1992) (*"Liggett"*); (2) a petition for reconsideration of that decision filed by the Michigan State Conference of Branches of the NAACP ("NAACP"); (3) an opposition filed by Radio Group of Grand Rapids, Inc. (formerly Adams Radio of Grand Rapids, Inc.), licensee of Stations WLAV/WLAV-FM; and (4) the NAACP's reply to the opposition. For the reasons which follow, we deny the petition.

2. In *Liggett*, we found that the licensee of Stations WLAV/WLAV-FM had interviewed and hired minorities and that there was no evidence of discrimination. Accordingly, we found that a grant of the renewal applications was in the public interest. However, because the licensee had failed to keep complete recruitment records, we granted renewal subject to reporting conditions. *Liggett*, 7 FCC Rcd at 4523-24.

3. Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (*WWIZ*); 47 C.F.R. § 1.106(c). Applying this standard, we conclude that reconsideration is not warranted with respect to our disposition of the license renewal applications for WLAV/WLAV-FM.

4. In seeking reconsideration, the NAACP does not dispute any factual finding concerning Stations WLAV/WLAV-FM. Rather, the NAACP faults the decision to renew the licenses subject to reporting conditions, arguing that the licensee's hiring record with respect to Blacks warranted a forfeiture or hearing designation.[1] However, we fully considered the licensee's record and efforts, including those concerning Blacks, in reaching our decision in *Liggett*. As we have repeatedly stated, reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken. *See, e.g., Isis Broadcast Group*, 8 FCC Rcd 24 (Rev. Bd. 1992), *citing WWIZ*.

5. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by the NAACP concerning the license renewal applications for Stations WLAV/WLAV-FM IS DENIED.

6. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail-- Return Receipt Requested, copies of this Memorandum Opinion and Order to the NAACP and the licensee of Stations WLAV/WLAV-FM.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] In its reply, the NAACP argues that the licensee offered only one upper-level job to a Black, not two as was stated in *Liggett*, 7 FCC Rcd at 4523, para. 24. We find this argument to be irrelevant. Renewal in that case would have been appropriate, regardless of whether one or two offers were made.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| Salem Media of Ohio, Inc. for renewal of license of Station WRFD(AM), Columbus, Ohio | File No. BR-890530XI |
| WPTW Radio, Inc. for renewal of license of Stations WPTW(AM) and WCLR(FM), Piqua, Ohio | File Nos. BR-890525VH and BRH-890525VI |

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 14, 1995; Released: July 21, 1995**

By the Commission:

1. The Commission has before it: (1) our decision in *Radio Ohio, Inc.*, 7 FCC Rcd 6355 (1992); (2) a Petition for Reconsideration of that decision filed by the Ohio State Conference of Branches of the NAACP (hereinafter "NAACP"); (3) the licensees' oppositions; and (4) the NAACP's reply to these oppositions. For the reasons which follow, we dismiss the NAACP's petition.

2. In *Radio Ohio, Inc.*, we concluded, *inter alia*, that the NAACP had not demonstrated that it was a "party in interest" as that term is used in Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), with respect to the stations' renewal applications. In this regard, we found that the declarations filed with the petition to deny failed to establish the NAACP's standing. Specifically, as to Station WRFD(AM), we held that the NAACP's declaration was late-filed and that the NAACP had failed to establish good cause for its late filing. With respect to Stations WPTW(AM)/WCLR(FM), we concluded that the NAACP's petition was not supported by the affidavit of anyone who claimed to be a listener of the stations or a resident within their service areas. After considering the NAACP's pleading as an informal objection, we granted the stations' applications, subject to reporting conditions.

3. In seeking reconsideration, the NAACP does not dispute the facts underlying our decision to treat its petition to deny as an informal objection. However, the NAACP suggests that the Commission's action with respect to its pleading relating to Station WRFD(AM) conflicts with the Commission's action in *WWOR, Inc.*, 6 FCC Rcd 6569, 6570 n.6 (1991). In the case of Stations WPTW(AM)/WCLR(FM), the NAACP now claims that James Daniel, President of the Ohio State Conference of the NAACP Branches and the individual who submitted a declaration in support of the NAACP's petition to deny, in fact resides within the service areas of the stations. In support of this assertion, the NAACP cites the *NAACP Branch Directory* (revised October 1992), which provides Mr. Daniel's address. However, Mr. Daniel's declaration with the NAACP's petition to deny did not include his address nor did it contain allegations that he was a listener of the stations or a resident of their service areas.

4. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, states than any party to an order, decision, report or action by the Commission or any other person aggrieved or whose interests are adversely affected may petition for reconsideration. *See also, Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984); 47 C.F.R. § 1.106. To qualify as a party, a petitioner for reconsideration must have filed a valid petition to deny against the application whose grant the petitioner now seeks to have reconsidered. *Community Access; Gulfcoast Broadcasting, Inc. (WMMK-FM)*, 8 FCC Rcd 483 (1993); *Montgomery County Broadcasting Corp.*, 65 FCC 2d 876 (1977). If the petition for reconsideration is filed by one who is not a "party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1); *Community Access*.

5. Unquestionably, the NAACP's petition to deny against the license renewal application for Station WRFD(AM) was not supported by a declaration as required by 47 U.S.C. § 309(d)(1). *See also*, 47 C.F.R. § 73.3584. Moreover, when the NAACP finally submitted the declaration of its Columbus, Ohio, area representative, it made no attempt to justify its late submission. Under the circumstances, we properly dismissed the NAACP's petition to deny against Station WRFD(AM). *See Gulfcoast Broadcasting, Inc. (WMMK-FM); Broadcast Stations Serving the State of Florida*, 3 FCC Rcd 1930 (1988). Moreover, contrary to the NAACP's suggestion, our action does not conflict with *WWOR, Inc.* There, the staff asked an entity that sought reconsideration of a Commission action and that had not participated in the underlying Commission decision to submit an affidavit supporting allegations of which the Commission could not take official notice. The Commission dismissed the petition for reconsideration after the entity failed to respond to the staff's invitation. The Commission's action in *WWOR, Inc.* resulted from its interpretation of Section 405 of the Communications Act and Section 1.106 of the Commission's Rules, which do not explicitly require, except under circumstances such as those present in *WWOR, Inc.*, that allegations in a petition for reconsideration be supported by a declaration. By comparison, Section 309 of the Communications Act, which governs petitions to deny, explicitly requires that allegations of which Commission may not take official notice must be supported by an affidavit. The NAACP's failure to tender with its petition to deny an affidavit containing allegations sufficient to establish that it was a party in interest to the license renewal application for Station WRFD(AM) warranted dismissal of the petition.

6. With respect to the NAACP's petition to deny against the license renewal applications for Stations WPTW(AM)/WCLR(FM), a proper declaration was never submitted. In this regard, there is no question that Mr. Daniel's declaration did not provide any factual basis for us to conclude that he was a party in interest as to those stations, and the NAACP offers no reason why we should accept *nunc pro tunc* its belated unverified assertion about his address. In sum, we properly dismissed the NAACP's petition to deny against Stations WPTW(AM)/WCLR(FM). *See Gulfcoast Broadcasting, Inc. (WMMK-FM)* .

7. As an informal objector, the NAACP lacks standing to bring the instant petition because it is not a "party to the proceeding" within the meaning of Section 405 of the Communications Act and Section 1.106 of the Commission's Rules. Moreover, the NAACP's petition for reconsideration has not demonstrated that its interests were adversely affected by our decision in *Radio Ohio, Inc.*, nor has it demonstrated that it was not possible for it to participate as a petitioner to deny in the earlier stages of the proceeding. Hence, we find that the NAACP has not complied with the procedural requirements of Section 1.106. *See Montgomery;* 47 C.F.R. § 1.106 . Therefore, we dismiss the NAACP's petition for reconsideration.

8. Accordingly, IT IS ORDERED, that the petition for reconsideration filed November 2, 1992 by the NAACP, IS DISMISSED.

9. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail– Return Receipt Requested, copies of this Memorandum Opinion and Order to the NAACP and the licensees of Stations WRFD(AM) and WPTW(AM)/WCLR(FM).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| Washtenaw Broadcasting Company, Inc.[1] for renewal of license of Stations WPZA(AM)/WAMX-FM, Ann Arbor, Michigan | File Nos. BR-890601ZX BRH-890601ZQ |
| Whitehall Convalescent Homes, Inc. for renewal of license of Station WAAM(AM), Ann Arbor, Michigan | File No. BR-890525VG |

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 14, 1995; Released: July 21, 1995**

By the Commission:

1. The Commission has before it: (1) our decision in *Double L Broadcasting of Lansing Limited Partnership*, 7 FCC Rcd 6435 (1992) (*"Double L Broadcasting"*); (2) a Petition for Reconsideration of that decision filed by the Michigan State Conference of Branches of the NAACP (hereinafter "NAACP"); [2] (3) a "Motion to Treat Petition for Reconsideration as Timely Filed" filed by the NAACP; (4) the licensees' oppositions to both the petition for reconsideration and the NAACP's motion; and (5) the NAACP's reply to these pleadings. For the reasons which follow, we dismiss the NAACP's petition and motion.

2. In *Double L Broadcasting*, we concluded, *inter alia*, that the NAACP had not demonstrated that it was a "party in interest" as that term is used in Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), with respect to the stations' renewal applications because the declarations filed with its petition to deny failed to establish the NAACP's standing. Specifically, the NAACP failed to provide a declaration from anyone who claimed to be a listener or service area resident of the Ann Arbor stations named in the petition to deny. After considering the NAACP's pleading as an informal objection, we granted the stations' applications, subject to reporting conditions. We also issued a $2,500 Notice of Apparent Liability to the licensee of Station WAAM(AM).[3] In seeking reconsideration, the NAACP does not dispute the facts underlying our decision to treat its petition to deny as an informal objection.

3. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, states than any party to an order, decision, report or action by the Commission or any other person aggrieved or whose interests are adversely affected, may petition for reconsideration. *See also, Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984); 47 C.F.R. § 1.106. To qualify as a party, a petitioner for reconsideration must have filed a valid petition to deny against the application whose grant the petitioner now seeks to have reconsidered. *Community Access; Gulfcoast Broadcasting, Inc. (WMMK-FM)*, 8 FCC Rcd 483 (1993); *Montgomery County Broadcasting Corp.*, 65 FCC 2d 876 (1977). If the petition for reconsideration is filed by one who is not a "party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1); *see Community Access.*

4. Unquestionably, the NAACP's petition to deny against the license renewal applications for Stations WAAM(AM) and WPZA(AM)/WAMX-FM was not supported by a declaration as required by 47 U.S.C. § 309(d)(1). *See also*, 47 C.F.R. § 73.3584. Under the circumstances, we properly dismissed the NAACP's petition. *See Gulfcoast Broadcasting, Inc. (WMMK-FM); Broadcast Stations Serving the State of Florida*, 3 FCC Rcd 1930 (1988). As an informal objector, the NAACP lacks standing to bring the instant petition because it is not a "party to the proceeding" within the meaning of Section 405 of the Communications Act and Section 1.106 of the Commission's Rules. Moreover, the NAACP's petition for reconsideration has not demonstrated that its interests were adversely affected by our decision in *Double L Broadcasting*, nor has it demonstrated that it was not possible for it to participate as a petitioner to deny in the earlier stages of the proceeding. Hence, we find that the NAACP has not complied with the procedural requirements of Section 1.106. *See Montgomery;* 47 C.F.R. § 1.106. Therefore, we dismiss the NAACP's petition for reconsideration.[4]

5. Accordingly, IT IS ORDERED, that the petition for reconsideration filed November 13, 1992 by the NAACP, IS DISMISSED.

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[1] On September 30, 1992, the Commission granted an application to assign the licenses of Stations WPZA(AM) and WAMX-FM from Washtenaw Broadcasting Company, Inc. to MW Blue Partnership. The assignments were consummated on October 8, 1992. For administrative convenience, we will use the name of the former licensee in this *Memorandum Opinion and Order*.

[2] The NAACP also sought reconsideration of that portion of *Double L Broadcasting* which dealt with Stations WJIM/WJIM-FM, Lansing; WBCK(AM)/WBXX-FM, Battle Creek; and WFMK-FM, East Lansing, Michigan. However, the NAACP has entered into a settlement agreement with the licensees of those stations. The joint request for approval of the agreement is pending.

[3] Whitehall Convalescent Homes, Inc. paid the forfeiture on October 20, 1992.

[4] Our decision in *Double L Broadcasting* was released on September 25, 1992. The NAACP filed its petition for reconsideration on November 13, 1992, well beyond the due date specified by Section 405 of the Act and Section 1.106(f) of our rules. The NAACP argues in its "Motion to Treat Petition for Reconsideration as Timely Filed" that we should accept its late filed petition for reconsideration because it did not receive a copy of *Double L Broadcasting* until November 9, 1992. Because we dismiss the NAACP's petition for failure to comply with the requirements of Section 1.106(b)(1), we need not reach the question of whether the petition for reconsideration should be treated as timely filed.

6. IT IS FURTHER ORDERED, that the "Motion to Treat Petition for Reconsideration as Timely Filed" IS DISMISSED AS MOOT.

7. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail-- Return Receipt Requested, copies of this Memorandum Opinion and Order to the NAACP and the licensees of Stations WAAM(AM) and WPZA(AM)/WAMX-FM.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

Pathfinder Communications Corporation File Nos.
BR-890531XD
BRH-890531WZ

For Renewal of License of
Stations WCUZ/WCUZ-FM
Grand Rapids, Michigan

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 14, 1995; Released: July 21, 1995**

By the Commission:

1. The Commission has under consideration: (1) its decision in *Liggett Broadcast, Inc.*, 7 FCC Rcd 4520 (1992) (*"Liggett"*); (2) a petition for reconsideration of that decision filed by the Michigan State Conference of Branches of the NAACP ("NAACP"); (3) an opposition filed by Pathfinder Communications Corporation, licensee of Stations WCUZ/WCUZ-FM; and (4) the NAACP's reply to the opposition. For the reasons which follow, we deny the petition.

2. In *Liggett*, we found no evidence that the licensee of Stations WCUZ/WCUZ-FM had engaged in discrimination. We found that the licensee had engaged in efforts to recruit and hire minorities and that it had employed some minorities in significant positions during the license term. We also found that the licensee had improved its recordkeeping, self-assessed its EEO efforts and added recruitment sources, albeit in the last year of the license term. Accordingly, we granted the renewal applications. However, because the licensee had not kept complete recruitment records for the majority of the license term, we admonished it to do so in the future. *Liggett*, 7 FCC Rcd at 4522.

3. Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (*WWIZ);* 47 C.F.R. § 1.106(c). Applying this standard, we conclude that reconsideration is not warranted with respect to our disposition of the license renewal applications for WCUZ/WCUZ-FM.

4. In seeking reconsideration, the NAACP does not dispute any factual finding concerning the stations. Rather, the NAACP faults the decision for not ordering a hearing or forfeiture based on the licensee's hiring record with respect to Blacks. However, we fully considered the licensee's record and efforts, including those concerning Blacks, in reaching our decision. As we have repeatedly stated, reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken. *See, e.g., Isis Broadcast Group*, 8 FCC Rcd 24 (Rev. Bd. 1992), *citing WWIZ.*

5. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by the NAACP concerning the license renewal applications for Stations WCUZ/WCUZ-FM IS DENIED.

6. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail-- Return Receipt Requested, copies of this Memorandum Opinion and Order to the NAACP and the licensee of Stations WCUZ/WCUZ-FM.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-119**

In the Matter of

Amendment of Section 73.202(b), RM-8667
Table of Allotments,
FM Broadcast Stations.
(Dafter, Michigan)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: July 13, 1995; Released: July 21, 1995**

**Comment Date: September 11, 1995**
**Reply Comment Date: September 26, 1995**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Dafter Community Broadcasters ("petitioner"), proposing the allotment of Channel 293A to Dafter, Michigan, as that community's first local broadcast service.[1] Petitioner stated an intention to apply for the channel, if allotted.

2. In support of its request, petitioner has provided an engineering statement that indicates a channel can be allotted to Dafter. According to petitioner, Dafter, Michigan, is a township located in Chippewa County in the "upper peninsula" area of Michigan. Petitioner also indicates that Dafter is a census designated place ("CDP").

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several states and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See e.g., Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Hannibal, OH*, 5 FCC Rcd 3315 (1990); and *Statenville, GA*, 5 FCC Rcd 2685 (1990). Although Dafter is attributed with a population of 150 persons by the 1995 edition of the *Rand McNally Commercial Atlas*, we may find that a population grouping does not constitute a community for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a library, schools, shopping centers, churches, a newspaper and social or civic organizations. *See e.g., Searles Valley, CA*, 3 FCC Rcd 5221 (1988); *see also, Naples, FL*, 41 RR 2d 1549 (1977). In past cases, we have rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question. Therefore, petitioner is requested to present the Commission with specific information to demonstrate that Dafter has the social, economic and governmental indicia to qualify it as a "community" for allotment purposes. *See Gretna, Marianna, Quincy and Tallahasee, Florida*, 6 FCC Rcd 633 (1991) and cases cited therein. Petitioner has stated that Dafter Township has been designated a CDP by the U. S. Department of Commerce. Although allotments are made to communities and not townships, our research does not indicate CDP status for Dafter or Dafter Township. Petitioner is requested to clarify the CDP status in comments.

4. Channel 293A can be allotted to Dafter, Michigan, in compliance with the Commission's minimum distance separation requirements. City reference coordinates have been used for this proposal.[2] Since Dafter is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

5. In view of the fact that the proposed allotment would provide a first local service to Dafter, the Commission believes it would serve the public interest to solicit comments on the proposal to allot Channel 293A to Dafter, Michigan, in the event it is ultimately found to qualify as a community for allotment purposes. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Dafter, as follows:

| | Channel No. | |
|---|---|---|
| Community | Present | Proposed |
| Dafter, Michigan | | 293A |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **September 11, 1995,** and reply comments on or before **September 26, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

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[1] The petitioner requested the allotment of Channel 233A to Dafter. However, our engineering analysis indicates that Channel 233A at city reference coordinates is short spaced to a one-step application to upgrade Station WFGE, Mackinaw, Michigan, from Channel 232A to Channel 233C3 (BPH 950223IC).

[2] The coordinates for Channel 293A in Dafter are 46-21-36 and 84-25-36.

Jeffrey D. Southmayd
Southmayd & Miller
1220 Nineteenth Street, N. W., Suite 400
Washington, D.C. 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Monmouth Cablevision Associates CUID Nos.
NJ0069 (Asbury Park)
NJ0161 (Ocean Township)
NJ0277 (Avon)
NJ0278 (Belmar)
NJ0279 (Bradley Beach)
NJ0280 (Brielle)
NJ0281 (Manasquan)
NJ0282 (Neptune City)
NJ0283 (Neptune Township)
NJ0284 (Sea Girt)
NJ0285 (South Belmar)
NJ0286 (Spring Lake)
NJ0287 (Spring Lake Heights)
NJ0288 (Wall Township)
NJ0456 (Interlaken)
NJ0483 (Farmingdale)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 1995; Released: April 5, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above.[1] Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on Feb-

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[1] Subsequent to the time period covered by this Order, Operator was purchased by Cablevision of Monmouth, Inc. As required by the context, the term "Operator" as used herein includes Operator's successors in interest.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Opeartor implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

ruary 7, 1995.[12] Operator filed additional information on March 27, 1995, in response to an inquiry by Commission staff.[13]

5. On November 18, 1993, Operator filed a motion to dismiss a complaint against its price in CUID No. NJ0284 that was filed on October 6, 1993. Operator argues that the complaint should be dismissed because the complainant failed to list the channels on the CPS tier in response to question 9 on FCC Form 329 as it then existed.[14] On December 3, 1993, the complainant filed a response to Operator's motion to dismiss which clarified that his complaint was concerned solely with Operator's charge for additional outlets.[15] Under the Cable Act of 1992 and the Commission's rules, rates for equipment that is used to receive the basic tier, including additional outlets, are regulated as part of the regulation of rates for the basic tier and thus are generally outside the Commission's jurisdiction.[16] We will therefore grant Operator's motion and dismiss the complaint filed October 6, 1993.

6. On March 28, 1994, Operator filed a motion to dismiss a complaint filed on February 28, 1994 by the New Jersey Board of Regulatory Commissioners ("New Jersey") that relates to all the franchise areas addressed in this Order. Operator argues that the complaint should be dismissed because New Jersey failed to list the channels included in the CPS tier or otherwise describe the cable programming service at issue. New Jersey filed its complaint on a revised FCC Form 329, released by the Commission in January 1994, that does not require an itemization of the channels in the CPS tier. Operator argues that the revised Form 329 is deficient because it does not request "a description of the cable programming service or associated equipment involved and, if applicable, how the service or associated equipment has changed."[17] Operator's argument does not persuade us that New Jersey's complaint is invalid or should be dismissed. The Commission revised Form 329 because experience had shown that the prior Form 329 requested unnecessary information and was confusing to many complainants. Form 329 was therefore revised consistent with the congressional mandate to avoid imposing unnecessarily "technical or complicated" pleading requirements on complainants.[18] In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint. New Jersey has standing to complain as a relevant state government entity,[19] and its complaint taken as a whole clearly relates to Operator's price for the CPS tier. We therefore find New Jersey's complaint valid and deny Operator's motion to dismiss.[20]

7. In its February 7, 1995 amended filing, Operator calculated a maximum permitted price for the CPS tier of $15.20 per month. However, Operator's actual price for the CPS tier was $15.69 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[21] The Commission's regulations implement Congress' directive by requiring operators to establish an equipment basket which includes "all costs associated with providing customer equipment and installation."[22] In Part III of FCC Form 393, an operator calculates its total customer equipment and installation costs which constitute the equipment basket. Form 393, Part II, Worksheet 3 unbundles these costs from the operator's total permitted regulated revenues in order to establish its maximum service rates.

b. In reporting its capital costs of leased customer equipment on Form 393, Part III, Schedule C, Operator did not include any costs for remotes. Operator's rate cards indicate that as of September 30, 1992 it leased remotes to customers for a monthly fee, and as of the initial date of regulation it provided remotes at "no fee" per month. Thus, Operator's monthly equipment revenue as of September 30, 1992 on Form 393, Part II, Worksheet 2, Line 204 includes revenue derived from the rental of remotes, but its unbundling figure on Part II, Worksheet 3, Line 301 does not include any costs associated with remotes. Because Operator calculates its permitted programming rates based on its September 30, 1992 regulated revenues and is not subtracting its costs for remotes from these revenues, Operator is recovering the costs associated with its rental of remotes through its charges for the basic and CPS tiers. Such a result is contrary to the statutory and regulatory unbundling requirement. Under our rules, an operator may

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[12] Operator's February 7, 1995 submission was made in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

[13] Letter from Jeffrey S. Steinberg, FCC, to Christopher A. Holt, attorney for Operator (Mar. 21, 1995).

[14] Operator also asserted another ground for dismissing the complaint. In light of our resolution of Operator's motion to dismiss, we find it unnecessary to address Operator's alternative argument.

[15] At the same time, the complainant filed a second Form 329 which included a complaint against Operator's charge for the CPS tier. We are accepting this second complaint as the first valid complaint against Operator's CPS price in CUID No. NJ0284.

[16] *See* Cable Act of 1992, Section 623(b)(3), 47 U.S.C. § 543(b)(3); 47 C.F.R. § 76.923(a).

[17] 47 C.F.R. § 76.951(b)(6).

[18] *See* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 64 (1992); *see also* Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5843-44, para. 339 (1993).

[19] *See* 47 C.F.R. § 76.950.

[20] Operator has also moved to dismiss a complaint that was filed later than New Jersey's complaint in CUID No. NJ0069. Because we have accepted New Jersey's complaint as properly filed, we find it unnecessary to rule on Operator's objection to the later filed complaint.

[21] 47 U.S.C. § 543(b)(3).

[22] 47 C.F.R. § 76.923(c).

choose not to charge customers for premises equipment, but it may not recover its costs associated with customer equipment through its programming rates.[23]

c. Because Operator has not reported its equipment costs for remotes, we must calculate a cost based on the best evidence available to us.[24] In order to do so, we examined the Form 393 filings made by Operator's affiliates in the State of New Jersey, and we observed that the reported gross book cost per unit of remotes ranged from $8.01 to $9.20. We then imputed to Operator a gross book cost per remote at the midpoint of this range, or $8.61. We further assumed, consistent with the filings of Operator's affiliates, that the number of remotes in service equalled the number of converters in service, and that Operator's remotes were depreciated according to the same schedule as its converters. Based on these assumptions, we calculated Operator's total annual capital costs for remotes to be $68,196. We therefore increased Operator's annual customer equipment and installation costs on Part III, Step G, Line 32 by $68,196, and made corresponding adjustments to Part III, Step G, Line 34 and Part II, Worksheet 3, Line 301.

d. In its most recent amended filing, Operator entered $15.20 as its current monthly rate for the CPS tier as of the initial date of regulation on Form 393, Part II, Worksheet 1, Line 101. However, Operator's rate card indicates that its actual monthly rate, exclusive of franchise fees, was $15.69. This figure is consistent with Operator's entry on Form 393, Part I and with Operator's Line 101 entry in its earlier Form 393 filings. The instructions to Form 393 require the operator to enter on Line 101 its actual current monthly charges. We have therefore corrected Line 101, Column B to match the figure on Operator's rate card.

e. Operator's Form 393, Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Instead of entering its current monthly equipment revenue, as required by the Form 393 instructions, Operator entered a figure based on its prior equipment rates. This observation is confirmed by the fact that Operator's Worksheet 2, Line 204 entry is the same as its Worksheet 1, Line 104 entry. As a result, Operator's Line 104 entry must be revised to reflect its current monthly equipment revenue. Since Operator restructured its rates, including its equipment rates, on September 1, 1993 in an attempt to comply with the Commission's regulations, the monthly equipment cost figure it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 revenue entry.[25] Accordingly, we correct Operator's Line 104 entry to equal Line 34, as adjusted pursuant to paragraph 6c, *supra*.

f. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1 on the basis of the most accurate data currently available.[26] In its most recent amended Form 393 filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of January 1994 using data released by the U.S. Department of Commerce on December 1, 1993. However, Operator's use of January 1994 as the base date through which it calculated the inflation adjustment is impermissible for CUID Nos. NJ0278 and NJ0284. Based on the date that the earliest valid complaint was served in each franchise area, the instructions to Form 393 permitted Operator an inflation adjustment only through October 1993 in CUID No. NJ0278 and November 1993 in CUID No. NJ0284.[27] Operator cannot be permitted to claim an additional inflation adjustment simply because it later amended its Form 393 filings. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the dates on which Operator should have filed Form 393. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993 in CUID No. NJ0278, 1.032 as the Inflation Adjustment Factor through November 1993 in CUID No. NJ0284, and 1.037 as the Inflation Adjustment Factor through January 1994, the base date Operator used in justifying its rates, in all other franchise areas.

8. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appen-

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[23] We also note that according to Operator's rate card, as of the initial date of regulation it offered new and used remotes for sale to subscribers. This practice creates a potential for Operator to recover its costs associated with remotes twice: once through its charges for rate-regulated services, and again through its sales revenues.

[24] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994); *see also* TCI Cablevision of Greater Michigan, Inc., CUID Nos. MI0025 *et al.*, DA 95-271, para. 8e (Cab. Serv. Bur., released Feb. 21, 1995).

[25] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[26] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[27] *See* FCC Form 393, page 11, instructions for line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form"); 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

dix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[28]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that Operator's motion to dismiss the complaint filed October 6, 1993 against its cable programming service price in Belmar, New Jersey, CUID No. NJ0278, IS GRANTED.

10. IT IS FURTHER ORDERED that the complaint filed October 6, 1993 against Operator's cable programming service price in Belmar, New Jersey, CUID No. NJ0278, IS DISMISSED.

11. IT IS FURTHER ORDERED that Operator's motion to dismiss the complaint filed February 28, 1994 by the New Jersey Board of Regulatory Commissioners IS DENIED.

12. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service price charged by Operator in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[29] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[30]

16. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS prices in the franchise areas addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| NJ0069 | 02/28/94 | 02/25/94 |
| NJ0161 | 02/28/94 | 02/25/94 |
| NJ0277 | 02/28/94 | 02/25/94 |
| NJ0278 | 10/18/93 | 10/12/93 |
| NJ0279 | 02/28/94 | 02/25/94 |
| NJ0280 | 02/28/94 | 02/25/94 |
| NJ0281 | 02/28/94 | 02/25/94 |
| NJ0282 | 02/28/94 | 02/25/94 |
| NJ0283 | 02/28/94 | 02/25/94 |
| NJ0284 | 12/03/93 | 11/29/93 |
| NJ0285 | 02/28/94 | 02/25/94 |
| NJ0286 | 02/28/94 | 02/25/94 |
| NJ0287 | 02/28/94 | 02/25/94 |
| NJ0288 | 02/28/94 | 02/25/94 |
| NJ0456 | 02/28/94 | 02/25/94 |
| NJ0483 | 02/28/94 | 02/25/94 |

**Appendix B**

| CUID No. | Actual Rate | Maximum Permitted Rate |
|---|---|---|
| NJ0069 | $15.69 | $15.13 |
| NJ0161 | $15.69 | $15.13 |
| NJ0277 | $15.69 | $15.13 |
| NJ0278 | $15.69 | $15.03 |
| NJ0279 | $15.69 | $15.13 |
| NJ0280 | $15.69 | $15.13 |
| NJ0281 | $15.69 | $15.13 |
| NJ0282 | $15.69 | $15.13 |
| NJ0283 | $15.69 | $15.13 |
| NJ0284 | $15.69 | $15.07 |
| NJ0285 | $15.69 | $15.13 |
| NJ0286 | $15.69 | $15.13 |
| NJ0287 | $15.69 | $15.13 |
| NJ0288 | $15.69 | $15.13 |
| NJ0456 | $15.69 | $15.13 |
| NJ0483 | $15.69 | $15.13 |

[28] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[29] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

[30] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-123**

In re

Review of the Prime Time
Access Rule, Section 73.658(k) of the
Commission's Rules

## ORDER GRANTING EXTENSION OF TIME FOR FILING REPLY COMMENTS

**Adopted: March 31, 1995; Released: March 31, 1995**

By the Chief, Mass Media Bureau:

1. On October 25, 1994, the Commission released a *Notice of Proposed Rule Making* in MM Docket No. 94-123, 9 FCC Rcd 9328 (1994) *("Notice")*, in this proceeding, soliciting comment on the legal and policy justifications, in light of current economic and technological conditions, for the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, and to consider the continued need for the rule in its current form. By an *Order* adopted on December 7, 1994, the deadline for filing comments was extended to March 7, 1995, and the deadline for filing reply comments was extended to April 6, 1995. *See Order Granting Extension of Time for Filing Comments and Reply Comments* in MM Docket No. 94-123, 9 FCC Rcd 7824 (1994).

2. On March 24, 1995, a motion for extension of time for filing reply comments in this proceeding was filed by the Network Affiliated Stations Alliance, which states that it is authorized to represent the Association of Independent Television Stations, Inc., Viacom, Inc. King World Productions, Inc., Capital Cities/ABC, Inc., CBS Inc., the National Broadcasting Company, Inc., the Motion Picture Association of America, Inc., and the Media Access Project ("Joint Petitioners") in this request. The motion requests that the deadline for filing reply comments be extended from April 6, 1995, to May 12, 1995.

3. The Joint Petitioners contend that the comments filed in this proceeding include detailed economic studies on all sides of the issues. These parties, who take differing views on the continued need for the Prime Time Access Rule, assert that certain data underlying those studies is now becoming available and is expected to be accessible for public review at the Commission shortly. In order to respond to the comprehensive economic analysis called for in the *Notice* and to properly evaluate the comments and economic studies submitted thus far, the Joint Petitioners suggest that absent an extension of time, any meaningful review of this data prior to the deadline for filing reply comments would be virtually impossible. These parties maintain that the grant of this request for a modest extension will serve the public interest by permitting a more thorough public and industry review of the economic data, which would, in turn, facilitate the submission of reply comments that will prove more useful in generating the comprehensive record that the Commission seeks in this proceeding.

4. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. Section 1.46, it is our policy that extensions of time for filing comments in rulemaking proceedings shall not be routinely granted. However, under the circumstances described above, we believe that the requested extension of time to file reply comments is warranted. This extension of time should facilitate the development of a full and complete record on the issues raised in the Notice and, thus, it appears reasonable to provide the commenting parties additional time to analyze and address these issues.

5. Accordingly, IT IS ORDERED that the above-mentioned motion for an extension of time IS GRANTED, and that the time for filing reply comments in this proceeding IS EXTENDED to **May 12, 1995.**

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 0.204(b), 0.283, and 1.45 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 92-256**

In the Matter of

Application of Open Network
Architecture and Nondiscrimination
Safeguards to GTE Corporation

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 31, 1995; Released: April 3, 1995**

By the Chief, Common Carrier Bureau

## I. INTRODUCTION

1. GTE Corporation and its affiliates ("GTE") have petitioned the Commission to waive the requirements that it file state and federal Open Network Architecture ("ONA") tariffs on April 4, 1995.[1] Specifically, GTE asked the Commission: (1) to defer the federal ONA tariff filing deadline until 30 days after the effective date of the 1995 Annual Access filings, and (2) to extend the due date for filing the state ONA tariffs until 30 days after the effective date of the federal ONA tariffs. In addition, GTE requested an extension until March 30, 1996, to file its first semi-annual tariff report. In this Memorandum Opinion and Order, we grant GTE's waiver requests, subject to the condition that GTE file illustrative tariffs by April 30, 1995.

## II. BACKGROUND

2. On April 4, 1994, the Commission extended to GTE the regulatory framework of Open Network Architecture ("ONA") and nondiscrimination safeguards that apply to the Bell Operating Companies ("BOCs").[2] The Commission, *inter alia*, required GTE to submit an ONA plan on January 4, 1995; to file federal and state ONA tariffs on April 4, 1995; and to implement ONA requirements and nondiscrimination safeguards by July 4, 1995.[3]

3. On January 4, 1995, GTE filed its ONA plan with the Commission.[4] In its Plan, GTE set forth its initial ONA service offerings, and described its proposed deployment of these services. GTE also described how it proposed to comply with the Commission's CEI requirements, which is required as a component of the ONA plan, and to implement the nondiscrimination safeguards.

4. At the time it submitted its ONA plan, GTE also petitioned the Commission to waive the requirement that it file state ONA tariffs on April 4, 1995, concurrently with the federal ONA tariffs.[5] In its petition for waiver, GTE requested permission to file the state ONA tariffs within thirty days after the effective date of the federal tariffs.[6]

5. The Commission by public notice dated January 17, 1995 invited interested parties to submit comments on GTE's ONA plan and/or its state ONA tariff waiver petition.[7] No comments were received during the comment period but the State of Hawaii ("Hawaii"), in a written *ex parte* pleading, subsequently filed a letter opposing the grant of the waiver as it pertains to GTE Hawaiian Telephone Company ("HTC").[8]

6. On March 2, 1995, GTE filed a petition for waiver of the April 4, 1995, deadline for filing the federal ONA tariffs.[9] In that petition, GTE requested the Commission to defer the filing date of the federal ONA tariffs until 30 days after the effective date of its 1995 Annual Access filings. GTE also requested the Commission to extend the deadline for the filing of its first semi-annual ONA tariff report from September 30, 1995 to March 30, 1996. In addition, GTE's petition asked that the Commission defer the ONA implementation date until three months after the federal ONA tariffs are filed. In a subsequent *ex parte* filing, GTE clarified that apart from those obligations that require fed-

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[1] Application of Open Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, GTE's Petition for Waiver of the Requirement to File Intrastate ONA Tariffs Concurrently with Federal ONA Tariff Filings, filed on Jan. 4 , 1995 (GTE State Tariff Waiver Petition); GTE's Petition for Waiver of Certain ONA Filing Requirements, filed on Mar. 2, 1995 (GTE Federal Tariff Waiver Petition).

[2] *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation,* 9 FCC Rcd 4922 (1994) (*GTE ONA Order*). Under the Commission's comparably efficient interconnection ("CEI") requirements, the basic services used by a carrier's own enhanced service operations must be available to other enhanced service providers ("ESPs") in an equally efficient manner. *See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* 104 FCC 2d 958, 1035-36, para. 147 (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *further recon.* 3 FCC Rcd 1135 (1988), *second further recon.* 4 FCC Rcd 5927 (1989), *rev'd on other grounds sub nom. California v. FCC,* 905 F.2d 1217 (9th Cir. 1990). ONA expanded the CEI concept beyond its service specific emphasis to require the carrier to "unbundle key components of its basic services and offer them to the public under tariffs, regardless of whether [the carrier's own] enhanced services utilize the unbundled components." *Phase I Order,* 104 FCC 2d at 1018, 1019-20, para. 113. The nondiscrimination safeguards include rules governing the use of customer proprietary network information, access to operations support systems, the disclosure of network information, and nondiscrimination in installation and maintenance. *See GTE ONA Order,* 9 FCC Rcd at 4941-4952, paras. 36-64.

[3] *Id.* at 4923, para. 1; 4954, paras. 71-73.

[4] Application of Open Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, GTE's Open Network Architecture Plan, filed on Jan 4, 1995 (GTE ONA Plan).

[5] GTE State Tariff Waiver Petition, *supra* note 1.

[6] *Id.*

[7] Public Notice, Pleading Cycle Established for Comments on GTE's Open Network Architecture Plan and Waiver to File Intrastate ONA Tariffs Concurrently With Federal ONA Tariffs, DA 95-48 (Jan. 17, 1995).

[8] Letter from Herbert E. Marks and Marc Berejka, Counsel, State of Hawaii to William F. Caton, Acting Secretary, FCC, filed by the State of Hawaii on Mar. 10, 1995 (Hawaii Letter).

[9] GTE Federal Tariff Waiver Petition, *supra* note 1.

eral tariffing, it did not seek a waiver of the July 4, 1995 deadline to implement ONA requirements and nondiscrimination safeguards.[10]

7. On March 9, 1995, the Commission placed GTE's federal waiver petition on public notice and invited comments on this petition.[11] Hawaii filed a letter urging the Commission to deny the waiver with regard to HTC,[12] and GTE submitted a reply.[13]

8. In this Memorandum Opinion and Order, we grant GTE's petitions for waiver, subject to the filing of illustrative tariffs, but generally do not address the merits of GTE's ONA Plan. We intend to consider the adequacy of that Plan in a subsequent order.

## III. FEDERAL WAIVER REQUEST

9. *GTE's Request.* In its petition, GTE states that the federal ONA tariffs must comply with the Commission's pricing requirements relating to the creation of access charge sub-elements and cost support requirements.[14] GTE maintains that one such requirement "is to establish the BSA rates by starting with the existing bundled End Office Switching ("EOS") revenues, subtracting the appropriate BSE revenue and dividing the residual revenue by the BSA units."[15] GTE asserts that the EOS revenues from the Annual Access tariff filing are the starting point for developing the ONA rates.

10. GTE notes that its current deadline for the 1995 Annual Access filing is March 31, 1995 -- four days before the April 4, 1995 deadline for filing federal ONA tariffs. GTE claims that it would take enormous resources to prepare both the ONA and 1995 Annual Access tariff filings simultaneously. According to GTE, these burdens are magnified by the fact that the Commission is presently conducting a rulemaking to consider changes in the price cap rules.[16] GTE argues that any changes in the price caps rules likely will require changes to the annual access tariff filings, which in turn would mandate revisions to the ONA filings.[17]

11. In its opposition, Hawaii argues that GTE's request is untimely. The State maintains that GTE has known of the filing deadline since the release of the *GTE ONA Order*, but failed to petition the Commission to reconsider the deadline.[18] In addition, Hawaii claims that the State Public Utilities Commission ("PUC") is currently conducting a far-reaching investigation of issues relating to telecommunications investment and infrastructure, including the unbundling of products and services. Hawaii notes that a hearing in that proceeding is scheduled for May, 1995 and that pre-hearing submissions are due a month earlier. Hawaii argues the Commission should require GTE to file its ONA tariffs by the original deadline so that the ONA tariffs can be considered in the Hawaii investigation.[19]

12. In reply, GTE denies that its waiver petition is untimely. GTE asserts that while it has known of the filing deadline since April 1994, current circumstances, such as the delay in the 1995 Annual Access filing deadline, have increased the burdens of filing the ONA tariffs by the current deadline.[20] In addition, GTE disputes that a delay in the filing of the GTE ONA tariff will hamper the State PUC investigation. GTE claims that, to the extent that its ONA plans are relevant to the intrastate proceeding, sufficient information on the manner in which it will implement ONA is contained in the ONA Plan on file with the Commission.[21]

13. *Discussion.* The Commission may waive any provision of its rules or orders if good cause is shown.[22] A showing of good cause requires the petitioner to demonstrate special circumstances that warrant deviation from the rules and to show how such deviation would serve the public interest.[23] We find that GTE has made a persuasive showing to extend the filing deadline for its federal ONA tariffs until August 31, 1995.[24] Given the impact that changes to the annual access filings may have on the ONA tariffs, GTE has demonstrated that deferring the filing of the federal ONA tariffs until after the effective date of the 1995 Annual Access tariffs would provide for a more orderly and efficient tariff filing and review process.[25]

14. Moreover, the Commission recently extended the deadline for the filing of the 1995 Annual Access tariffs to 30 days following the release of a decision in the price caps rulemaking, to be effective on August 1, 1995.[26] The filing deadline for the 1995 Annual Access tariffs, therefore, postdates the current filing deadline for the ONA tariffs.

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[10] Letter from Edwin Shimizu, Director Regulatory Matters, GTE, to Laurel Bergold, and Rose Crellin, FCC, filed by GTE on Mar. 6, 1995 (GTE March 6 Ex Parte Letter).

[11] Public Notice, Pleading Cycle Established for Comments on GTE's Petition for Waiver of Certain Open Network Architecture Requirements, DA 95-454 (Mar. 9, 1995).

[12] Letter from Herbert E. Marks and Marc Berejka, Counsel, State of Hawaii to William F. Caton, Acting Secretary, FCC, filed by the State of Hawaii on Mar. 20, 1995 (Hawaii Opposition).

[13] Reply of GTE, filed Mar. 24, 1995 (GTE Reply).

[14] GTE Federal Tariff Waiver Petition, at 2.

[15] *Id.* at 2. Basic Service Arrangements ("BSAs") are one of the four types of ONA services. The BSAs are the fundamental federally tariffed switching and transport services that permit the ESP to communicate to its customers through the exchange carrier's network. Basic Service Elements ("BSEs") are optional unbundled features that an ESP may require or find useful in configuring an enhanced service. *See Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 36, para. 56 (1988) (*BOC ONA Order*), *recon.*, 5 FCC Rcd 3084 (1990), *aff'd sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993).

[16] *See Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994).

[17] GTE Federal Tariff Waiver Petition, at 3. GTE states that the United States Telephone Association (USTA) has petitioned the Commission to waive the deadline for the filing of the 1995 Annual Access tariff filings until 30 days after the release of the price cap order. GTE claims that if USTA's petition is granted, GTE's ONA filing would be based on pre-1995 annual access tariff filing data, and that it may have to update the ONA tariff to include the effects of the changes in new data. *Id.* at 3.

[18] Hawaii Opposition, at 2.

[19] *Id.* at 3.

[20] GTE Reply, at 2-3.

[21] *Id.* at 3.

[22] 47 C.F.R. § 1.3.

[23] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[24] GTE is required to file its federal ONA tariffs on three months notice. Thus, GTE's ONA tariffs must be scheduled to take effect on November 30, 1995.

[25] We note that on March 30, 1995, the Commission adopted a Report and Order regarding changes in price caps requirements. *See* Commission Affirms Commitment to Competition and Fair Long Distance Rates in LEC Price Cap Plan, March 30, 1995.

[26] *1995 Annual Access Tariffs*, DA 95-494 (released Mar. 16, 1995)(*USTA Waiver Order*).

Absent the grant of GTE's waiver petition, GTE's ONA tariff filings, which will be based on pre-1995 Annual Access filing data, likely will have to be updated. Deferring the ONA filing deadline should eliminate the need for this type of tariff revision during the pendency of the tariff review process.

15. We reject Hawaii's contention that the waiver was untimely filed.[27] Moreover, as GTE points out, the deferral of the filing deadline for the 1995 Annual Access tariffs is an intervening event that increases the administrative burdens associated with the present ONA filing deadline.

16. We note that GTE already offers most of the federal ONA services in its ONA plan on an unbundled basis.[28] We conclude that the advantages of avoiding the prospect of multiple tariff revisions outweighs the short delay in the introduction of ONA services not presently available under tariff, and thus grant GTE's petition. We emphasize, however, that this waiver is limited to GTE's federal tariff filing obligation. GTE remains obligated to implement the remainder of the ONA requirements, including the nondiscrimination requirements, by July 4, 1995.[29]

17. With respect to Hawaii's interest in obtaining ONA-related information for use in the Hawaii PUC's omnibus investigation of telecommunications investment and infrastructure, GTE was required to file illustrative state and federal ONA tariffs with the Commission as part of its ONA Plan.[30] GTE's ONA Plan did not comply with this requirement. Such illustrative tariffs could provide Hawaii with information that might be useful in the state omnibus investigation. Thus, while we do not address generally in this Memorandum Opinion and Order the adequacy of GTE's ONA Plan, we require GTE to file with the Commission illustrative state and federal ONA tariffs by April 30, 1995.

18. In addition, we grant GTE's related request to extend the filing of the first semi-annual tariff report to March 30, 1996. In light of our decision to extend the deadline for the filing of the federal and state ONA tariffs, we believe that a corresponding extension for the filing of reports on those tariffs is warranted.

## IV. STATE WAIVER REQUEST

19. *GTE's Request.* In support of a deferral of the state ONA filing deadline, GTE asserts that its usual practice is to file state access tariffs only after the federal tariffs go into effect.[31] GTE states that the state and the federal ONA tariffs are "highly interrelated," and that mandated changes in the two federal ONA tariffs likely would result in changes insome or all of the forty-five state tariffs. [32] GTE claims that by requiring the concurrent filing of state and federal ONA tariffs, state authorities would be presented with state tariffs implementing federal policy before this Commission had examined the federal tariffs. Because the state authorities likely would postpone action on the state tariffs "until the FCC has acted" on the federal ONA tariffs,[33] GTE predicts that a grant of the waiver would not delay state implementation of the ONA tariffs. GTE also claims that a grant of its waiver would permit a more precise fit between the federal and the state tariffs by eliminating any possible need for tariff revisions. Finally, GTE asserts that a waiver would permit GTE to comply with a number of state filing regulations.[34]

20. In its *ex parte* letter, the Hawaii asks the Commission to deny GTE's requested waiver as applied to HTC. Hawaii contends that the initial schedule adopted by the Commission would enable Hawaii to "more actively participate (if need be) in the development of the ONA tariff" than if the filing was delayed.[35] In addition, Hawaii asserts that the filing deadline should not be deferred so that the ONA tariffs can be considered in the State PUC investigation of issues relating to telecommunications investment and infrastructure.

21. *Discussion.* We conclude that an extension of GTE's state ONA tariff filing deadline is in the public interest. The record shows that the rates and rate structures of services that GTE offers both on an interstate and intrastate basis typically are identical.[36] As a consequence, any mandated changes in the federal tariffs would result in comparable modifications to the state services. We therefore believe that deferring the state ONA filings until 30 days after the federal tariffs become effective would minimize the prospect of multiple tariff revisions during the initial tariff review process. A waiver also would permit GTE to conform to its usual state tariff filing procedures. And it would avoid any inconsistency between the federal and state filing requirements.

22. In making this determination, we have considered the possible impact of a grant of the requested state waiver on service availability. The record shows that most of GTE's proposed state ONA services currently are available in existing tariffs.[37] Deferring the filing of state ONA tariffs would not have a substantial effect on service availability. We note that no ESPs opposed the waiver on the grounds that it would delay the introduction of service, or for any

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[27] Under the Commission's rules, the agency may issue waivers "at any time" on its own motion or upon the petition of an interested party. Thus, in contrast to a petition for reconsideration, there is no deadline for the filing of a petition for waiver.

[28] GTE has stated that it currently offers 10 (of 13) proposed BSAs and 21 (of 29) proposed BSEs on an unbundled basis. GTE March 6 Ex Parte Letter. BSAs and BSEs are the two types of ONA services that must be federally tariffed. *See BOC ONA Order*, 4 FCC Rcd at 116, para. 226.

[29] *See GTE ONA Order*, 9 FCC Rcd at 4923, para. 1. As noted above, GTE, in an *ex parte* letter filing clarified that it was not generally seeking an extension of the ONA deadline. *See* GTE March 6 Ex Parte Letter.

[30] In the *GTE ONA Order*, 9 FCC Rcd at 4953, para. 68, we required GTE to comply with the same ONA requirements that we had previously applied to the BOCs. One of those requirements was that the BOCs file illustrative federal and state ONA tariffs. *See BOC ONA Order*, 4 FCC Rcd at 171-73, paras. 326-30.

[31] *See* Letter to William F. Caton, Acting Secretary, FCC, from F. Gorden Maxson, Director-Regulatory Affairs, GTE, filed by GTE on Mar. 13, 1995 (GTE March 13 *Ex Parte* Filing).

[32] GTE State Tariff Waiver Petition at 2. GTE asserted that it often uses, as justification, the federal tariff filing and accompanying support material. GTE March 12 *Ex Parte* Filing at 3.

[33] GTE State Tariff Waiver Petition at 2.

[34] *Id.* at 3.

[35] Hawaii Letter at 3.

[36] *See* Letter to William F. Caton, Acting Secretary, FCC, from F. Gorden Maxson, Director, Regulatory Affairs, GTE, filed on Mar. 15, 1995 (GTE March 15 Ex Parte Letter).

[37] *See* GTE March 13 *Ex Parte* Filing at 1 & Att. A.

other reason. We find that the impact of a grant of the requested waiver on service availability at most is small and temporary.[38]

23. We note that Hawaii does not address or refute GTE's showing that the current filing dates result in an inefficient and burdensome tariff filing and review procedure. In addition, we are unpersuaded by Hawaii's contention that adherence to the Commission's initial schedule will permit Hawaii "to more actively participate (if need be) in the development of the ONA tariff than if filing is delayed."[39] The sole effect of the waiver is to defer the date that the state ONA tariffs are filed. The waiver has no effect on the ability of the State or any other party either to participate in state tariff proceedings or to complain to the Commission that any aspect of the state ONA tariff is inconsistent with federal policy.[40] Nor does it limit the ability of Hawaii to take any action in its investigation of telecommunications investment and infrastructure.

24. We recognize the State's concern about obtaining ONA-related information for use in the intrastate investigation. As noted above, we are requiring GTE in this Memorandum Opinion and Order to file illustrative state and federal ONA tariffs by April 30, 1995. These tariffs could be useful in the intrastate investigation.

## V. CONCLUSION

25. Accordingly, in this order, we grant GTE's petitions for waiver of the deadline for the filing of its federal and state ONA tariffs. GTE must file federal ONA tariffs on or before August 31, 1995, to be effective on November 30, 1995. We also defer the deadline for the filing of GTE's state ONA tariffs to 30 days after the effective date of the federal ONA tariffs. In addition, we grant GTE an extension until March 30, 1996 in which to file its first semi-annual tariff report. Finally, we require GTE to file illustrative federal and state ONA tariffs by April 30, 1995.

## VI. ORDERING CLAUSE

26. IT IS HEREBY ORDERED, pursuant to Sections 1, 4(i), 4(j), 205, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(j), 205, 218, and Sections 0.91. 0.291, 1.1, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.1, 1.3, that GTE's petitions for waivers are granted and that GTE shall file illustrative state and federal ONA tariffs by April 30, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[38] GTE claims that the state PUCs likely will defer consideration of the state ONA tariffs until the federal ONA tariffs become effective. GTE State Waiver Petition at 2-3. If GTE's prediction is accurate, the grant of a waiver will not delay the availability of any ONA service.

[39] Hawaii Letter at 3.

[40] *See BOC ONA Order*, 4 FCC Rcd at 163, para. 312.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**CC Docket No. 87-124**

**Released: April 12, 1995**

## FCC Establishes Hearing Aid Compatibility Negotiated Rulemaking Committee, and Sets Meeting Dates

The Federal Communications Commission (FCC) has established the Hearing Aid Compatibility Negotiated Rulemaking Committee (Committee), as part of the proceeding in CC Docket No. 87-124.

The Committee will provide recommendations to the Federal Communications Commission (FCC) to be used in the formulation of requirements for hearing aid compatible wireline telephones in work places, hospitals, certain other health care facilities, prisons, hotels and motels. Included among the recommendations will be one on whether to lift the suspension of enforcement of Sections 68.112(b)(1), (3), and (5) of the Commission's Rules. 47 C.F.R. §§ 68.112(b)(1), (3), (5). Those sections require that all wireline telephones in all work places, hospitals, certain other health care facilities, prisons, hotels and motels be hearing aid compatible by May 1, 1993 for establishments with 20 or more employees and by May 1, 1994 for establishments with fewer than 20 employees. The scope of the activity of the Committee will include all steps necessary to assemble data, perform analyses, and provide advice to the FCC concerning all of the issues required to address the regulation of wireline telephones which need to be hearing aid compatible, as discussed in the Commission's public notice of November 7, 1994, FCC 94-280. The establishment of this Committee is necessary and in the public interest.

In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice also advises interested persons of the initial and proposed subsequent meetings of the Committee.

**DATES:** Committee meetings will be held on the following dates: April 13, April 20, April 27, May 11, May 18, May 25, May 30 and June 13, 1995. All meetings will be held at 9:30 A.M. EDT.

**LOCATION OF MEETINGS:** For the meetings of April 13, April 27, May 11, May 18 and May 25, Federal Communications Commission, 1919 M Street, NW, Room 856, Washington, DC 20554; for the meetings of April 20 and June 13, International Bureau, FCC, Eighth Floor, 2000 M Street, N.W., Washington, DC 20554; for the meeting of May 30, Eleanor Roosevelt High School, 7601 Hanover Parkway, Greenbelt, MD 20770; or as otherwise announced at the meetings.

**FOR FURTHER INFORMATION CONTACT:** Greg Lipscomb, Designated Federal Official of the Hearing Aid Compatibility Negotiated Rulemaking Committee, Domestic Services Branch, Domestic Facilities Division, Common Carrier Bureau, Federal Communications Commission, Mail Stop 1600B2, 2025 M Street, NW, Suite 6008, Washington, D.C. 20054; Voice (202) 634-4216; TTY (202) 632-0484; Fax (202) 634-6625; Internet address: glipscom fcc. gov

**SUPPLEMENTARY INFORMATION:** The Committee was established by the Federal Communications Commission to bring together significantly affected entities to discuss and to recommend approaches to developing recommendations to the FCC for requirements for hearing aid compatible (HAC) telephones in work places, hospitals, certain other health care facilities, prisons, hotels and motels. The FCC solicited nominations for membership on the Committee pursuant to the Negotiated Rulemaking Act of 1990, Public Law 101-648, November 28, 1990, and selected members which are significantly affected by the proposed rules. See Public Notice in CC Docket No. 87-124, FCC 94-280, 59 FR 60343, November 23, 1994. The members of the Committee are as follows:

Aeronautical Radio, Inc.

Alexander Graham Bell Association for the Deaf, Inc.

American Hotel & Motel Association

American Health Care Association

American Speech-Language-Hearing Association

Communications Workers of America

Equal Employment Advisory Council

Federal Communications Commission

General Services Administration

Hearing Industries Association

IBM

League for the Hard of Hearing

National Association of the Deaf

National Center for Law and Deafness

Self Help for Hard of Hearing People

Tele-Communications Association

Telecommunications for the Deaf, Inc.

Telecommunications Industry Association

United States Telephone Association

Members of the general public may attend the meeting. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. The public may submit written comments to the Committee. The comments must be submitted two business days before the meeting in which the commenter desires his/her comments to be distributed. In addition, comments at the meeting by parties or entities not represented on the Committee will be permitted to the extent time permits. Comments will be limited to five minutes in length by any one party or entity, and request to make such comments to the Committee in person must be received two business days before the meeting in which the commenter desires to be heard. Requests for comment opportunity, and written comments, should be sent to Greg Lipscomb at the address under "FOR FURTHER INFORMATION CONTACT," stated above.

**AGENDA:** The planned agenda for the first meeting is as follows:

1. Introductions and Welcoming Remarks
2. Nomination of Facilitator
3. Introduction of Committee Members
4. Committee Charter and Related Matters
5. Organizational Protocols
6. Agreement on "Consensus"
7. Work Program and Documentation
8. Organization of Work and Working Groups
9. Meeting Schedule and Locations
10. Agenda for Next Meeting
11. Other Business

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Time Warner Cable of Greater Boston — CUID Nos.
MA0012, Malden
MA0047, Malden
MA0048, Medford
MA0057, Somerville
MA0061, Winthrop
MA0164, Wakefield

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 12, 1995; Released: April 14, 1995**

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the prices Time Warner Cable of Greater Boston ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are less than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Time Warner Entertainment, LP dba Oceanic Cablevision — CUID Nos. HI0001, Waianae; HI0004, Oahu; HI0005, Honolulu; HI0006, Honolulu; HI0007, Kailua; HI0008, Kalihi; HI0009, Kaneohe; HI0010, Palolo; HI0012, North Shore; HI0014, Waipahu; HI0041, EWA District; HI0057, Ahuimanu; HI0058, Aliamanu; HI0059, Enchanted Hills; HI0060, Hauula; HI0061, Iwilei; HI0062, Laie; HI0063, Kaaawa; HI0064, Kaimuki; HI0065, Kahaluu; HI0066, Kaneohe Marine Corps; HI0067, Kapahulu; HI0068, Maunawili; HI0069, Moanalua; HI0070, Pearl Harbor; HI0071, Salt Lake; HI0072, Waimanalo

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 12, 1995; Released: April 14, 1995**

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Time Warner Entertainment, LP; dba Oceanic Cablevision ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Mid-Carolina Cable CUID No. SC0368 (McBee)

Order Denying Jurisdiction

## MEMORANDUM OPINION AND ORDER

**Adopted: April 12, 1995; Released: April 14, 1995**

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of the Commission's Rules to Clarify Signature Requirement for License Applications in the Commercial Mobile Radio Services

**ORDER**

**Adopted: April 12, 1995; Released: April 12, 1995**

By the Chief, Wireless Telecommunications Bureau and the Managing Director:

## I. INTRODUCTION

1. This *Order* clarifies and makes certain nonsubstantive, editorial revisions to the Commission's rules governing signature requirements for license applications in the Commercial Mobile Radio Services (CMRS). This clarification of and associated amendments to the Commission's rules are intended to facilitate the implementation of electronic filing of all CMRS applications, including applications for Personal Communications Service (PCS).

## II. BACKGROUND

2. In October 1992, Congress amended the Communications Act of 1934, as amended, (the "Act") to allow electronic filing of license and construction permit applications.[1] Specifically, Sections 308(b) and 319(a) of the Act were amended to allow applications to be signed "in any manner or form, including by electronic means, as the Commission may prescribe by regulation."[2] A conforming amendment also was added to eliminate the requirement of a "signed" waiver under Section 304 of the Act.[3]

3. Pursuant to the authority expressly delegated by Congress, the Commission amended its rules in the *Part 22 Rewrite Order*[4] to allow all common carrier applications filed with the Commission to be signed in any manner or form, including by electronic means.[5] The signature requirement of new Section 1.743(e) of the Commission's rules, 47 CFR § 1.743(e), applies to all common carrier services.

## III. DISCUSSION

4. Under the Omnibus Budget Reconciliation of 1993,[6] all CMRS are to be regulated as common carriers.[7] In addition, in the *CMRS Second Report and Order*,[8] the Commission concluded that PCS presumptively will be a commercial mobile radio service and, therefore, subject to common carrier regulation.[9] To facilitate electronic filing in these services, we clarify that the signature requirement applied to all common carrier applications pursuant to Section 1.743 of the Commission's rules also will apply to all CMRS applications, including PCS applications. Since this is not expressly stated in the Commission's rules, we are also making nonsubstantive, editorial revisions to Parts 20 and 24 of the Commission's rules. In particular, we are adding a cross-reference that relates to the signature requirement applicable to PCS applications to Section 1.743 in Part 20, which governs the licensing and regulation of CMRS, and in Part 24, which governs the licensing and regulation of PCS.[10] This *Order* also amends Section 1.743(e) of the Commission's rules to provide that the Wireless Telecommunications Bureau (the "Bureau") may accept electronic filings for CMRS applications.

5. We anticipate that the narrowband and broadband PCS applications (including both short-form and long-form applications) will comprise one of the largest categories of applications that must be processed by the Bureau. Thus, facilitating electronic filing will allow us to process these applications more efficiently. Our ultimate goal is to eliminate the filing of paper applications wherever possible. Electronic filing will expedite the licensing process by eliminating the need for manual entry of application data into the Commission's data base. We also hope to develop the means to generate and transmit license information to licensees electronically, with no intermediate paper documents. Within the last two years, the former Private Radio

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[1] Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, 106 Stat. 3533 (1992), § 204.

[2] 47 U.S.C. §§ 308(b), 319(a).

[3] 47 U.S.C. § 304. Section 304 of the Act, as amended, provides that "[n]o station license shall be granted by the Commission until the applicant therefore shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

[4] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Service, CC Docket No. 92-115, Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service, CC Docket No. 94-46, Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, CC Docket No. 93-116, *Report and Order*, 9 FCC Rcd 6513 (1994), *recon. pending* (*Part 22 Rewrite Order*).

[5] *Id.* at ¶ 39. Similarly, the Commission previously modified the signature requirements for license applications in the services governed by Parts 80, 87, 90, 94, 95, and 97 of the Commission's rules. *See* Amendment of the Commission's Rules to Modify Signature Requirements for License Applications in the Private Radio Services, FCC 93-174, 8 FCC Rcd 2662 (1993).

[6] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993) (Budget Act).

[7] Communications Act of 1934, § 332(c)(1)(A), as amended by the Budget Act.

[8] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411 (1994), *recon. pending* (*CMRS Second Report and Order*).

[9] *Id.* at ¶ ¶ 119, 123. *See also* 47 CFR § 20.9.

[10] This also will allow electronic filing of PCS applications by applicants who seek to be treated as PMRS providers under Section 20.9(b) of the Commission's rules, 47 CFR § 20.9(b).

Bureau conducted electronic filing experiments with the Industrial Telecommunications Association and the Utilities Telecommunications Council and completed a pilot project with the Association of Public Safety-Communications Officers, Inc. Based on these initiatives, the Bureau intends to establish electronic filing procedures in the near future.

6. We emphasize that under the rules as amended, handwritten signatures will continue to be required on all applications unless and until specific procedures are established for electronic filing of such applications. Such procedures will be implemented by future Public Notices in the *Federal Register*, modified application forms, and other published procedures.

## IV. CONCLUSION

7. The rule changes adopted in this *Order* relate to matters of practice and procedure only. Therefore, they are excepted from the notice and comment requirement of the Administrative Procedure Act, 5 U.S.C. § 553(a), and may be put into effect immediately upon publication in the *Federal Register*.[11]

8. Accordingly, IT IS ORDERED that, pursuant to delegated authority, Sections 1.743, 20.10, 24.2, and 24.13 of the Commission's rules, 47 CFR §§ 1.743, 20.10, 24.2, and 24.13, ARE AMENDED as set forth below.

9. IT IS FURTHER ORDERED that this *Order* is effective upon publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney, Chief
Wireless Telecommunications Bureau

Andrew S. Fishel
Managing Director

## RULE CHANGES

Parts 1, 20 and 24 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

### PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

**Authority: Sections 1, 4(i), 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 151, 154, 303, unless otherwise noted.**

2. Section 1.743 is amended by revising paragraph (e) to read as follows:

**§ 1.743 Who may sign applications.**

* * * * *

(e) "Signed," as used in this section, means an original hand-written signature, except that by public notice in the *Federal Register* the Wireless Telecommunications Bureau or the Common Carrier Bureau may allow signature by any symbol executed or adopted by the applicant with the intent that such symbol be a signature, including symbols formed by computer-generated electronic impulses.

### PART 20 – COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 continues to read as follows:

**Authority: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.**

2. Section 20.10 is added to read as follows:

**§ 20.10 Who may sign applications.**

See part 1 of this chapter, § 1.743, for practices and procedures governing signatures on license applications.

### PART 24 – PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

**Authority: Sections 4, 302, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, and 332, unless otherwise noted.**

2. Section 24.2(b) is revised to read as follows:

**§ 24.2 Other applicable rule parts.**

* * * * *

(b) *Part 1.* This part includes rules of practice and procedure for application signature requirements, adjudicatory proceedings including hearing proceedings, and rule making proceedings; procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and forfeiture proceedings; and the environmental processing requirements that, if applicable, must be complied with prior to initiating construction.

3. Section 24.13 is added to read as follows:

**§ 24.13 Who may sign applications.**

See part 1 of this chapter, § 1.743, for practices and procedures governing signatures on license applications.

[11] *See* 5 U.S.C. § 553(d)(3); 47 CFR § 1.427(b).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Deferral of Licensing of MTA | GN Docket No. 93-253 |
| Commercial Broadband PCS | ET Docket No. 92-100 |

**ORDER**

**Adopted: April 12, 1995; Released: April 12, 1995**

By the Chief, Wireless Telecommunications Bureau:

1. In an "Emergency Motion to Defer MTA PCS Licensing" filed on March 8, 1995, Communications One, Inc. (COI) asks the Commission to defer the licensing of the A and B blocks in the 2 GHz Personal Communications Service ("broadband PCS"). For the reasons stated below, we are denying COI's motion.

2. COI states that it is a woman-controlled communications company that intends to participate in the broadband PCS entrepreneurs' block auction.[1] COI argues that if a stay of A and B block licensing is not granted, future entrepreneurs' block auction winners will suffer a competitive disadvantage because the companies that prevailed in the A and B block auctions will have an "open-ended headstart over small, disadvantaged companies."[2] COI also notes that the U.S. Court of Appeals for the District of Columbia Circuit is considering a challenge to the minority and gender preferences established for the entrepreneurs' block auctions.[3] To eliminate the alleged disadvantage to future entrepreneurs' block auction winners, COI proposes that the Commission defer licensing of the A and B block auction winners until after the C block auction is concluded so that all 30 MHz PCS licenses in any market area would be awarded simultaneously.

3. PCS Primeco, L.P. (Primeco) has filed comments in opposition to COI's motion.[4] Primeco is a winning bidder in eleven markets in the A and B block auction and also intends to participate in partnerships or joint ventures controlled by designated entities that intend to bid in the C block auction. Primeco argues that COI's motion is an untimely request for reconsideration of the Commission's decision to stagger the licensing of PCS blocks.[5] Primeco also contends that delaying the licensing of the A and B block auction winners will deprive the public of significant benefits in the form of new services and increased competition among wireless service providers.[6]

4. We find that COI has failed to show good cause to delay the licensing of the A and B blocks. The argument raised by COI was expressly addressed in the *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, in which the Commission affirmed its decision to use a sequence of auctions to license broadband PCS.[7] In that decision, the Commission expressly rejected the argument that the PCS licensing sequence should be changed to prevent A and B block winners from gaining an unfair headstart over other PCS licensees.[8] The Commission noted that auctioning the A and B blocks first would in fact provide designated entities with important information about the value of PCS licenses that would assist them in attracting capital and formulating bid strategies. The Commission also expressly declined to delay the final licensing of the A and B block winners, noting that the overriding public interest in rapid introduction of service outweighed the risk of A and B block winners gaining a headstart advantage.[9]

5. We find that COI's effort to raise these issues again in an "emergency motion" amounts to an untimely petition for reconsideration of the Commission's prior decision. We disagree with COI's suggestion that the possibility of a delay of the C block auction presents a new circumstance that the Commission did not previously consider. To the contrary, the Commission's decision to proceed with the first phase of PCS licensing before subsequent auctions were conducted or scheduled demonstrates that it considered prompt licensing of PCS to be paramount even though the timing of future auctions remained unknown.

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[1] Motion at para. 1. COI states that it intends to participate in the BTA-based entrepreneurs' block auction. It is unclear whether COI intends to participate in the BTA-based C block auction.

[2] Motion at para. 6.

[3] On March 15, 1995, the D.C. Circuit granted Telephone Electronics Corporation's (TEC) Emergency Motion for a Stay of the Commission's entrepreneurs' block rules and the C block auction. *See Telephone Electronics Corporation v. FCC*, No. 95-1015 (Order, March 15, 1995). The Court has scheduled oral argument on the merits for September 12, 1995. Accordingly, the C block auction, originally scheduled for April 17, 1995, cannot occur until the Court rules on the merits of TEC's petition for review or the stay is otherwise lifted.

[4] Primeco submitted a letter to Chairman Reed Hundt on March 23, 1995 and filed an opposition on March 24, 1995. Although Primeco's pleadings were late filed, we consider their arguments herein. We also consider the arguments set forth in COI's response to Primeco filed on March 27, 1995.

[5] Primeco Opposition at 2.

[6] *Id.* at 4-6.

[7] Implementation of Section 309(j) of the Communications Act, Competitive Bidding, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd 6858 (1994), paras. 126-132.

[8] *Id.*

[9] *Id.*, para. 132. The Commission rejected a similar "headstart" argument in declining to delay licensing of wireline cellular carriers pending the selection of non-wireline licensees. Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, *Report and Order*, 86 FCC 2d 469, 491 n.57 (1981), *recon.*, 89 FCC 2d 58 (1982). Although the Commission agreed to consider requests for a six month moratorium on wireline licensing if a non-wireline applicant could demonstrate public interest harm, it ultimately concluded that none of the parties filing headstart requests had met the necessary burden. *See* Amendment of Part 22 of the Commission's Rules to Provide For Filing and Processing of Applications For Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, 6226 (1991).

6. Even if we were to treat COI's motion as a timely request for stay of A and B block licensing, we conclude that COI has failed to meet the standards necessary for grant of the requested relief. Among other factors, a party seeking a stay must show irreparable harm if the stay is not granted and that granting the stay will serve the public interest.[10] COI has failed to show that it would be irreparably harmed by prompt granting of the A and B block licenses. We find that COI's contention that subsequent PCS licensees will be fatally hamstrung in their ability to compete against A and B block licensees is purely speculative. Even if A and B block licensees obtain some benefit from being licensed before other PCS providers, we believe that numerous competitive opportunities remain open to subsequent PCS entrants. Moreover, subsequent entrants may benefit from licensing of the A and B blocks because it will enable them to evaluate the business strategies and initial performance of the A and B block licensees in making their own strategic business decisions. Finally, even assuming *arguendo* that a significant interval between the issuance of the A and B block licenses and issuance of the C block licenses would reduce the value of the C block licenses, COI and other bidders are free to discount their bids in the C block auction accordingly.

7. We also conclude that COI has failed to show that staying licensing of the A and B auction winners is in the public interest. Congress has mandated that the Commission promote the development and rapid deployment of PCS for the benefit of the public with a minimum of administrative or judicial delay.[11] Prompt licensing of the A and B blocks furthers this Congressional mandate by speeding the introduction of services that will compete with cellular and other established mobile services. We believe that the public interest in rapidly providing new competitive sources of wireless services outweighs any possible competitive harm that might result from the A and B block licensees being licensed ahead of auction winners in other PCS blocks. We emphasize that it remains our intent to proceed expeditiously with the C block auction and future PCS auctions to the extent legally permissible.

8. For these reasons, and pursuant to Section 1.43 of the Commission's Rules, 47 C.F.R. §1.43, COI's Emergency Motion to Defer MTA PCS Licensing is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

[10] A party moving for a stay must show: (1) a strong likelihood of prevailing on the merits; (2) irreparable harm; (3) issuance of the stay will not harm others; and (4) that granting a stay will serve the public interest. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

[11] 47 U.S.C. § 309(j)(3)(A).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: April 14, 1995**

**Comments Sought on Request for Waiver of Certain Part 90 Rules Filed by Viking Dispatch Services, Inc. to Establish a Private Mobile Radio Service Wide Area Dispatch System**

On December 7, 1994, and March 29, 1995, Viking Dispatch Services, Inc. (Viking) filed applications and associated requests for waiver of the Commission's Rules to establish a Private Mobile Radio Service Dispatch system that would provide dispatch communications to entities eligible for licensing under Part 90 of the Commission's Rules on a not-for-profit, cost-shared basis. Viking plans to provide two-way dispatch communications to persons eligible in the Public Safety Radio Services, Special Emergency Radio Service, Industrial Radio Services, and Land Transportation Radio Services. The system would operate in the 896-901/935-940 MHz band.

Viking requests rule waivers to permit use of up to 40 channels and to permit the system to provide service on channels allocated to the Industrial/Land Transportation Category (I/LT) to entities eligible in the Business Radio Service. In the first filing, a waiver was also requested so that all channels authorized at remote or satellite sites in the system would be afforded primary protection.

Interested parties may file comments on the waiver requests on or before **April 28, 1995,** and reply comments on or before **May 5, 1995,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy of any comment filed should be sent to John B. Johnston, Private Wireless Division, Wireless Telecommunications Bureau, FCC, Washington, D.C. 20554. A copy should also be sent to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the waiver requests may be obtained from ITS at (202) 857-3800. Copies are also available for public inspection during regular business hours in Room 5322, 2025 M Street, N.W., Washington, D.C.

For further information contact John B. Johnston at (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Applications of
MOTOROLA, INC.

For Consent to Assign 800 MHz Licenses to
NEXTEL COMMUNICATIONS, INC.

**ORDER**

**Adopted: April 27, 1995; Released: April 27, 1995**

By the Chief, Wireless Telecommunications Bureau:

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## I. OVERVIEW

1. On December 9, 1994, Motorola Inc. ("Motorola") submitted an FCC Form 574 seeking consent to the assignment of certain 800 MHz Specialized Mobile Radio ("SMR") licenses to Nextel Communications, Inc. ("Nextel") and its subsidiaries pursuant to 47 C.F.R. § 90.153. Also on December 9, 1994, Motorola requested FCC approval to assign most of its 800 MHz SMR licenses to a wholly-owned Motorola subsidiary, ESMR, Inc., through *pro forma* assignments. Motorola plans to merge ESMR with Nextel by assigning ESMR licenses to nine different Nextel subsidiaries.[1]

2. We sought comment to assist us in determining whether the proposed assignment of licenses is in the public interest. Opponents of the assignment argue that Nextel's spectrum consolidation does not serve the public interest because it decreases the number of SMR competitors and will result in increased prices. Motorola and Nextel contend that the assignment will enhance competition in the Commercial Mobile Radio Services ("CMRS") market among SMR, cellular, and Personal Communications Services ("PCS") providers. After considering the record, we decide that the public interest is best served by approving the assignment, which we believe will promote competition in the broader CMRS marketplace.

3. The proposed assignment includes the transfer of unconstructed Motorola authorizations to Nextel. Such unconstructed authorizations may only be transferred if their service contours do not extend beyond the "footprint" of already constructed analog facilities.[2] Motorola has certified that all of its authorizations for unconstructed facilities being assigned to Nextel are ancillary to underlying constructed analog stations, and that they have service contours that fall within the footprint of its existing wide-area system.[3] Thus, we grant Motorola's request to assign to Nextel both constructed SMR licenses and unconstructed authorizations located within its existing footprint; however, we condition the assignment on notification from the parties that the underlying transaction between Nextel and Motorola has been consummated within one-hundred eighty days (180) days from the release date of this Order.

## II. BACKGROUND

4. Motorola is a publicly-traded corporation headquartered in Schaumburg, Illinois. Motorola is one of the world's largest manufacturers and sellers of electronic equipment and components, including radio communications equipment and related services. Motorola has developed an advanced digital technology known as the Motorola Integrated Dispatch Enhanced Network, ("iDEN") which enables SMR operators to increase the capacity of their systems by approximately fifteen-fold over analog systems.[4] iDen also can provide the infrastructure for a seamless nationwide SMR system.[5]

5. Nextel is a publicly-traded U.S. corporation, based in Rutherford, New Jersey, owning numerous subsidiaries that hold SMR licenses throughout the United States. Nextel intends to implement a nationwide, seamless, all-digital integrated network capable of providing interconnected mobile telephone service, fleet dispatch communications, alpha/numeric paging service, voice mail, and future circuit-switched and packet-data offerings through a single subscriber handset.[6] In its quest to establish a nationwide system, Nextel has acquired and is in the process of acquir-

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[1] Motorola seeks to transfer licenses to the following Nextel subsidiaries: Saber Communications, Inc.; Nextel Western Acquisition Corp.; Smart SMR of California, Inc.; Smart SMR of New York, Inc.; Dispatch Communications of New England, Inc.; Dispatch Communications of Mid-Atlantic, Inc.; Smart SMR of Illinois, Inc.; Smart SMR of Texas, Inc.; and Powerfone, Inc.

[2] *See Fleet Call, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 1533, 1536, *recon. dismissed*, 6 FCC Rcd 6989 (1991) (*"Fleet Call"*); Letter from Ralph A. Haller, Chief, Private Radio Bureau, to Mr. David E. Weisman (Dec. 23, 1992), 8 FCC Rcd 143, 144 (1992) ("Weisman Letter").

[3] *See* Letter from Robert L. Pettit to Rosalind K. Allen, Acting Chief, Commercial Radio Division, Wireless Telecommunications Bureau (March 31, 1995) ("Pettit Letter").

[4] Motorola Reply Comments at 11. *See* Appendix A for a list of comments, dates filed, and short-form citations used throughout this Order.

[5] *Id.*

[6] *Id.*

ing local and regional SMR systems throughout the United States.[7] In the current transaction, Nextel seeks to acquire approximately 1,527 Motorola licenses.[8]

6. On August 4, 1994, Nextel entered into an "Agreement and Plan of Contribution and Merger" ("Agreement") with Motorola.[9] The Agreement involves, *inter alia*, the transfer of Motorola's SMR licenses to Nextel in exchange for approximately 24% of Nextel's voting stock.[10] In addition, Nextel has agreed to use Motorola's iDen technology to establish its wide-area digital network.[11]

7. The U.S. Department of Justice ("DOJ") has reviewed the Nextel-Motorola Agreement to determine whether the merger violates U.S. antitrust laws. DOJ approved the Nextel acquisitions in a proposed Final Judgment, subject to Nextel's divestiture of forty-two 800 MHz channels in Atlanta once a concurrent proposed merger is completed.[12] The DOJ Proposed Final Judgment also imposes a cap on the amount of 900 MHz spectrum that may be owned and controlled by Nextel and Motorola in thirteen specific cities.[13] On October 27, 1994, the United States, Motorola, and Nextel filed a stipulation in the United States District Court for the District of Columbia consenting to the entry of the Proposed Final Judgment.[14]

## III. PLEADINGS

8. Pursuant to Section 90.153 of the Commission's rules,[15] we issued a *Public Notice* on December 21, 1994, soliciting comments on Motorola's assignment application to assist us in determining whether the proposed assignment is in the public interest, convenience or necessity.[16] In response to the *Public Notice*, Clark's Electronics, Communications Center, Inc., Teton Communications, Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., and Accu Comm, Inc. (hereinafter collectively "Clark") filed joint comments, and McCaw Cellular Communications, Inc. ("McCaw") and Gary Smith ("Smith") filed individual comments. Nextel and Motorola filed reply comments.[17]

9. Clark and Smith, oppose the assignment contending that the assignment is not in the public interest because it would permit Nextel to monopolize SMR radio frequencies.[18] Clark, by incorporating the comments it filed in response to the prior merger of OneComm and Nextel, argues that the Motorola/Nextel transaction violates antitrust laws and policies.[19] According to Clark, the relevant product market for analyzing competition issues is the 800 MHz SMR market.[20] Clark therefore concludes that Nextel's domination of the 800 MHz SMR market -- which Clark contends will be exacerbated by Motorola's assignment of licenses to Nextel -- is anti-competitive and contrary to public interest.[21]

10. In response, Nextel and Motorola argue that grant of the proposed assignment will produce significant public interest benefits by fostering the development of a nationwide SMR system that will serve as a competitive alternative to existing wireless and future PCS offerings.[22] They assert that the assignment is in the public interest because it will promote competition in the CMRS marketplace, thereby increasing the number of services available to consumers.

11. McCaw generally supports the assignment, but requests that the Commission condition its approval on Nextel's provision of equal access to interexchange telecommunications service providers.[23] In reply, Motorola and Nextel argue that imposition of such a condition is beyond the scope of this proceeding, because the Commission has already initiated a separate rule making exploring imposition of equal access requirements on CMRS providers.[24]

12. As a separate but related matter, Clark requested consolidation of this proceeding with the OneComm/Nextel transfer of control proceeding.[25] We previously denied Clark's request because the applicants are distinct entities, and their applications raise different issues that are properly dealt with separately.[26] In addition, the respective business agreements are structured differently and involve dif-

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[7] On July 13, 1994, Nextel entered into an agreement to acquire OneComm, which holds 800 MHz SMR licenses in a number of Western states and, on August 5, 1994, Nextel entered into an agreement to acquire Dial Page, which holds 800 MHz SMR licenses in twelve Southwestern states. *See U.S. v. Motorola, Inc. and Nextel Communications, Inc.*, Case No. 1:94 CV02331 (Hogan, J.) (D.D.C., filed Oct. 27, 1994), Competitive Impact Statement ("CIS") at 8.

[8] *See* Assignment of Authorization and cover letters from Robert Pettit to Terry Fishel, Chief, Land Mobile Branch (Dec. 9, 1994), listing licenses to be transferred.

[9] CIS at 9.

[10] *Id.*

[11] *Id.*

[12] *U.S. v. Motorola, Inc. and Nextel Communications, Inc.*, Civil Action No. 94-2331 (D.D.C.) ("DOJ Proposed Final Judgment") at 7. The Proposed Final Judgment remains subject to final approval by the court. Because the analysis in this Order is based on the Commission's own policies and rules, our decision to grant Motorola's application is not conditioned on such approval. Should the court, however, approve the Proposed Final Judgment, Nextel would be required to divest itself of forty-two 800 MHz channels in Atlanta as well as any 900 MHz licenses held in thirteen specified cities that exceed a specified cap.

[13] *Id.* at 5. Nextel and Motorola are restricted in the number of 900 MHz licenses they can hold in the following thirteen cities: Boston, Chicago, Dallas, Denver, Los Angeles, San Francisco, Miami, Orlando, New York, Philadelphia, Washington, D.C., Detroit, and Seattle.

[14] *Id.*

[15] 47 C.F.R. § 90.153.

[16] *See* 47 C.F.R. § 90.153; *see also Public Notice*, "Wireless Telecommunications Bureau Seeks Comment On Motorola's Request For Commission Consent to Assign Licenses to Nextel Communications, Inc.," DA 94-1567 (Dec. 21, 1994).

[17] *See* Appendix A.

[18] *See* Clark Comments at 3-7; Smith Comments at 1.

[19] Clark Comments at 7-10.

[20] *See* Clark Comments, Attachment G at 13-15.

[21] *Id.* at 14-16.

[22] Motorola Reply Comments at 2, 11; Nextel Reply Comments at 3.

[23] McCaw Comments at 1, 6.

[24] Motorola Reply Comments at 12-13; Nextel Reply Comments at 21. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service, CC Docket No. 94-54, *Notice of Proposed Rule Making and Notice of Inquiry*, 9 FCC Rcd 5408 (1994).

[25] *See* Clark Motion to Consolidate Actions.

[26] *See* In the Matter of Applications of Nextel Communications, Inc., for Transfer of Control of OneComm Corporation, *Order*, 10 FCC Rcd 3361, DA 95-263, rel. Feb. 17, 1995, *recon. pending*, at ¶ ¶ 16-20 (*"OneComm Order"*).

ferent business terms, which is reflected by the fact that OneComm's application was for a transfer of control and Motorola's application is for an assignment.

## IV. DISCUSSION

### A. Impact of Assignment on Competition

13. *Background.* Clark argues that Motorola's assignment of licenses to Nextel, one of Motorola's largest competitors, is contrary to the public interest because it will increase prices and reduce the quality of service to the public.[27] In addition, Clark contends that the current transaction, when considered together with Nextel's proposed acquisition of OneComm, Dial Page, and Questar, will enable Nextel to attain monopoly status and extinguish competition in the SMR service industry.[28] Clark's assertions are based on the premise that the 800 MHz SMR market is a discrete product market. Nextel and Motorola, on the other hand, argue that Nextel's nationwide network is in the public interest, because it will increase competition within the wireless marketplace as a whole.[29]

14. The Bureau has already had the opportunity to evaluate the competitive impact of Nextel's proposed nationwide network.[30] In the *OneComm Order,* we determined that Nextel's nationwide network, if successful, will foster overall competition in the flourishing CMRS marketplace.[31] We also concluded that increased competition throughout the broader CMRS market serves the public interest because it promotes technological innovation and acts as a check on price increases.[32]

15. *Discussion.* When examining an assignment under the public interest standard of Section 310(d) of the Communications Act, an important factor we consider is the effect of the assignment on competition. In the *CMRS Third Report and Order,* the Commission determined that all CMRS services -- including paging, SMR, PCS, and cellular -- are actual or potential competitors with one another and should therefore be regarded as substantially similar for regulatory purposes.[33] In addition, to prevent CMRS providers from restricting competition by aggregating spectrum, the Commission established a 45 MHz cap for combined PCS, cellular, and SMR licenses classified as CMRS in which an entity may have an attributable interest in any geographic area at any point in time.[34] The Commission also determined that, because SMR spectrum is more encumbered than other CMRS spectrum, a maximum of 10 MHz of SMR spectrum will be attributed to any one entity for purposes of imposing the overall CMRS cap, even if"that entity has more than 10 MHz of SMR spectrum.[35] As Motorola points out, Nextel holds no cellular or PCS licenses and thus will be well within the overall spectrum cap after the assignment of Motorola's SMR licenses.[36]

16. Apart from our finding that Nextel's acquisition of Motorola's licenses would not cause it to exceed the CMRS cap, we further conclude that Motorola's assignment of licenses to Nextel serves the public interest by promoting competition in the CMRS marketplace. We agree with Motorola and Nextel that Nextel's acquisition of additional licenses is likely to promote competition by bringing Nextel one step closer to a nationwide all-digital, integrated mobile communications network.[37] Nextel's planned network would provide interconnected mobile telephone service, fleet dispatch communications (both interconnected and non-interconnected), alpha/numeric paging service, voice mail, and, in the near future, circuit switched and packet data offerings through a single handset.[38] The Commission has identified a trend towards this type of convergence among CMRS offerings and has concluded that convergence will ultimately produce wide-spread direct competition among service providers.[39] DOJ also supports our finding that approval of these assignments is pro-competitive, generally concluding that the most immediate effect of the Motorola/Nextel transaction could be to expedite meaningful competition to established cellular companies.[40]

17. We also reject Clark's contention that Motorola's proposed assignment to Nextel violates antitrust principles.[41] Application of antitrust principles begins with an analysis of the relevant product market in which competition may be affected.[42] Clark asserts that the relevant

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[27] Clark Comments at 8.
[28] Clark Comments at 2, 10.
[29] Motorola Comments at 2; Nextel Comments at 3.
[30] *See OneComm Order* at ¶ ¶ 23-33.
[31] *Id.* at ¶ 25.
[32] *Id.*
[33] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order,* 9 FCC Rcd 7988 at 8009, ¶ 37 *et seq. ("CMRS Third Report and Order").* While the Commission noted that PCS licensees may in the near future compete with existing CMRS providers, it did not specifically include PCS in its market analysis because at the time, there were no PCS operators offering service.
[34] *Id.* at 8100, ¶ 238. We are applying the CMRS 45 MHz spectrum cap in our analysis of this transaction because we expect that Nextel will be classified as a Commercial Mobile Radio Service provider in 1996. *See* Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order,* 9 FCC Rcd 1411 (1994) at ¶ ¶ 280-283.
[35] *CMRS Third Report and Order,* 9 FCC Rcd at 8100, ¶ 275.
[36] Motorola Reply Comments at 5, n.14.
[37] *Id.* at 2; Nextel Reply Comments at 3.
[38] Motorola Reply Comments at 11.
[39] *See CMRS Third Report and Order,* 9 FCC Rcd at 8021-8026.
[40] Motorola Reply Comments at 12. *See also* CIS at 12 ("Nextel's consolidation of SMR spectrum... may enable it to create a third mobile telephone service to compete with established cellular services. The result could be a wider variety of wireless services at a lower cost in the near future."), and Letter from Jack A. Markell, Senior Vice President, Nextel Communications, Inc., *Wall St. J.,* Mar. 6, 1995 at A-14.
[41] We came to the same conclusion with respect to One Comm's proposed transfers to Nextel. *See OneComm Order* at ¶ 28.
[42] *United States v. Continental Can Co.,* 378 U.S. 441 (1964); *United States v. E.I. du Pont de Nemours & Co.,* 353 U.S. 586 (1957); *Standard Oil Co. v. United States,* 337 U.S. 293, 299-300 n.5 (1949). The relevant product market is the "line of commerce" within which a service or product is considered interchangeable with a reasonable substitute, given consideration of price, use, and quality. *Brown Shoe Co. v. United States,* 370 U.S. 294, 324-25 (1962); *United States v. FCC,* 652 F.2d 72, 97 (D.C. Cir. 1980); *General Electric Co.,* 4 FCC Rcd 8207, 8208-09 (1989). We also are guided in our analysis of the competitive effects of the proposed merger by the most recent Department

product market is limited to SMR service at 800 MHz. Nextel and Motorola, on the other hand, argue for a product market consisting of mobile wireless services as a whole.[43] We find the evidence presented herein more closely supports the latter conclusion, and that the relevant product market is all terrestrial CMRS offerings.[44] Specifically, we adopt a definition of the product market that includes cellular, SMR, 220 MHz, interconnected Business Radio Service, conventional dispatch, paging and PCS offerings.[45] Our expansive product market definition is consistent with that adopted by the Commission in the *CMRS Third Report and Order* for purposes of determining substantial similarity among CMRS offerings. As discussed above, Nextel's planned network will embody the type of convergence of CMRS offerings that the Commission determined would promote competitive choices for CMRS consumers.[46] Nextel ultimately plans to provide interconnected mobile telephone, dispatch, paging and messaging service; therefore, we include in the relevant product market all current sources of these services (i.e., cellular, SMR, 220 MHz, interconnected Business Radio Service, conventional dispatch and paging), as well as those sources that will be available within the next year (i.e., broadband and narrowband PCS).[47]

18. Consequently, we disagree with Clark's contention that 800 MHz SMR is a self-contained market; rather, as we concluded in the *CMRS Third Report and Order*, SMR service is one of many competitive wireless services striving to meet the needs of consumers who desire mobile communications.[48] Although technical variations exist among wireless services, their functions frequently overlap with one another, or functional overlap can be created easily with moderate investment. For example, SMRs have the flexibility to offer interconnected voice or non-interconnected dispatch services and many choose to offer both.[49] Cellular and PCS providers also have substantial flexibility to offer a multiplicity of wireless services. All CMRS providers are now permitted to offer dispatch service.[50] For consumers, this results in a wide array of substitutable alternatives from which to choose.[51] Thus, we reject Clark's assertion that Nextel should not be viewed as competing with cellular unless it chooses to provide "cellular-like" service. This balkanized view of the relevant product market is inconsistent with the more expansive analytical framework the Bureau derives from the marketplace that exists at present and is likely to exist in the near future.[52]

19. In addition to determining the product market, antitrust analysis requires examination of the relevant geographic market in which competition potentially is affected by the transaction.[53] We received relatively little comment on the definition of the relevant geographic market. Clark states that it generally agrees with DOJ's definition of the geographic market as the area within a 35-mile radius of a particular city center.[54] We do not decide this issue, but accept Clark's definition for purposes of our analysis here. While a broader geographic market definition may be more appropriate, our conclusion is not affected by this issue.[55]

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of Justice - Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,571 (1992) ("*Guidelines* ").

[43] *See* Motorola Reply Comments at 11; Nextel Reply Comments at 17.

[44] We do not include air-to-ground, maritime and satellite-based offerings since they do not appear reasonably interchangeable with Nextel's planned service.

[45] We include broadband and narrowband PCS in our market analysis because as a potential competitor, these PCS offerings already have served to lower prices for mobile telephone service and increase capabilities of existing offerings. *See, e.g., Communications Daily*, April 24, 1995 at 1. We do not include unlicensed PCS in the product market in this case because its applications are not sufficiently clear at present for us to conclude that it does belong in the product market.

[46] *CMRS Third Report and Order*, 9 FCC Rcd at 8021-8026.

[47] We observe that the Commission has recently developed a narrower product market definition in the context of *Applications of Craig O. McCaw, Transferor and American Telephone and Telegraph Company, Tranferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and Its Subsidiaries*, File No. ENF-93-44, File No. 05288-CL-TC-1-93, *Memorandum Opinion and Order*,FCC 94-238, released Sept. 19, 1994 (*McCaw-AT&T Merger Order*), *recon. pending*. There, the scope of the relevant product market was not at issue, and the Commission ostensibly found that cellular service constituted the relevant product market. At the same time, the Commission suggested that PCS and cellular should be considered to be in the same product market. *McCaw-AT&T Merger Order*, at paras. 11 and 39. In this proceeding, the record suggests that a broader range of service offerings other than simply cellular service is at issue, lending support to a more expansive definition of the product market.

[48] *CMRS Third Report and Order*, 9 FCC Rcd at 8012, ¶ 43.

[49] *See* Nextel Reply Comments at 17; Motorola Reply Comments at 11.

[50] *See* Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, GN Docket No. 94-90, *Report and Order*, FCC 95-98 (March 7, 1995), 60 Fed. Reg. 15,490 (March 24, 1995).

[51] Even assuming that we accept Clark's view of the dispatch market as discrete, and that the proposed assignments would strengthen Nextel's presence within this limited definition of the relevant product market, we find nonetheless that the benefits of approving these assignments outweigh any potential anticompetitive consequences in a dispatch market. *See, e.g., United States v. FCC*, 652 F.2d 72, 88-89 (D.C. Cir. 1980) (*en banc*).

[52] "It could be argued that the mobile marketplace is nothing more than a constellation of diverse service offerings that seldom intersect in meeting highly differentiated customer needs. Thus, it could be argued, for example, that customers desiring conventional interconnected SMR dispatch services would not be likely to subscribe to cellular service as a substitute. Similarly, such an argument would hold that cellular customers could not reasonably be expected to purchase one-way paging as a substitute. We do not subscribe to such a balkanized view of the CMRS marketplace. Such a narrow conception does not comport with the realities of the marketplace, does not advance our objectives under the Communications Act, and, we believe, is not consistent with antitrust principles." *CMRS Third Report and Order*, 9 FCC Rcd at 8020-21.

[53] The geographic market is the area in which buyers can obtain alternative sources of supply, or in which there are sellers who act to restrain the prices charged to those buyers. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963); *Common Carrier Services*, 95 F.C.C. 2d 554, 573 (1983), *rev'd on other grounds, AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993).

[54] Clark Comments, Attachment G at 15; *see also* CIS at 6.

[55] PCS and cellular are licensed in larger geographical areas, and we have proposed to license SMRs in larger geographical areas as well. *See Third Report and Order*, 9 FCC Rcd at 7988, ¶ ¶ 114-115.

20. Based on the above market definitions, we find the Motorola assignment of licenses to Nextel to be fully consistent with antitrust principles. We find unpersuasive the claims of opponents that the proposed acquisition will result in increased prices and a reduction in the quality of service.[56] Because alternative sources of CMRS offerings are available, if Nextel increases its prices or lowers the quality of service, it will lose business. Equally unpersuasive is the claim that the proposed merger eventually will eliminate independent SMR systems as viable businesses.[57] We agree with Nextel that our priority is to protect competition, not competitors, for the benefit of consumers.[58] In short, we find no evidence to support the view that competition will be reduced in the relevant markets we have defined above. Instead, we view increased mobile service options for consumers at lower prices to be the more likely outcome.[59]

21. We note that our analysis of the competitive impact of the Motorola/Nextel transaction differs from that of DOJ, which defined the relevant product market as consisting only of trunked SMR service in the 800 MHz, 900 MHz, and 220 MHz bands.[60] Nevertheless, DOJ's analysis also supports our conclusion. Despite its considerably narrower definition of the product market, DOJ has approved Nextel's combined acquisition of OneComm, Dial Page, and Motorola subject only to certain restrictions affecting 900 MHz SMR and the divestiture of forty-two 800 MHz channels in Atlanta after the Dial Page transaction is completed.[61] We also agree with DOJ that Nextel will continue to face competition from 220 MHz, 800 MHz, and 900 MHz providers. Consequently, we do not accept the contrary argument made by Clark that 220 MHz and 900 MHz SMR should be excluded from the relevant product market on the grounds that they are "unlicensed" services. Limiting the product market in this manner ignores the potential for new entry on frequencies that have not been licensed but are available for licensing.

22. Clark's real concern appears to be the lack of availability of new spectrum for its own growth requirements and those of similarly situated small SMR operators.[62] Clark ignores the fact, however, that the spectrum licensed to Motorola is already occupied and therefore unavailable to competing service providers. Hence, we agree with Motorola that Motorola's assignment of licenses to Nextel will not exacerbate any spectrum shortage as Clark contends, nor will denial of Motorola's assignment application provide these entities with the spectrum they desire.[63] The issue of spectrum availability raised by Clark is a serious one, which the Commission is already considering in the context of the 800 MHz SMR wide-area licensing proceeding.[64] The decisions made in that proceeding to alleviate spectrum scarcity, however, will apply equally regardless of whether Motorola or Nextel holds the licenses at issue here. Therefore, we see no reason to deny the Motorola assignment to Nextel on the basis of spectrum scarcity.

**B. Transfer of Unconstructed Licenses**

23. *Background.* Motorola's application includes the proposed transfer of unconstructed SMR licenses to Nextel. Section 90.609(b) of the Commission's rules prohibits an applicant from assigning or transferring a license to operate a conventional or trunked radio system prior to the completion of construction of the facility.[65] This prohibition does not apply, however, to the transfer of unconstructed authorizations for low-power, digital stations that are *ancillary* to underlying constructed high-power analog SMR licenses if the analog system is being converted to a wide-area system.[66] Such authorizations for low-power base stations are not for unconstructed facilities in previously unserved areas; we consider them instead to be components of an existing system that is in the process of being reconfigured.[67] Therefore, during the initial stages of a conversion, we grant *de facto* temporary frequency exclusivity to a licensee throughout its "footprint." We have defined the footprint of a system as "the contiguous and overlapping service areas of stations that are (1) constructed and placed in operation, and (2) currently licensed to or managed by the applicant."[68]

24. *Discussion.* Motorola has certified that all of the unconstructed authorizations that it proposes to transfer to Nextel are digital stations that are "ancillary" to underlying constructed analog stations.[69] Furthermore, Motorola has represented that each of the unconstructed facilities for Motorola's digital system fall within the footprint of its existing analog system.[70] Because Motorola's unconstructed authorizations are ancillary to underlying constructed analog stations, and they fall within the contiguous and overlapping service area of Motorola's constructed facilities, we consider them to be components of an existing system that is in the process of being reconfigured. Therefore, we grant Motorola's request to assign unconstructed authorizations located within its existing footprint to Nextel.

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[56] Clark Comments at 8.

[57] Clark Comments at 6-7.

[58] Nextel Reply Comments at 11; *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) ("The question whether [the defendant's] conduct may be properly characterized as exclusionary cannot be answered by simply considering its effect on [its competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way."); H *awaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) (FCC did not conform to public interest mandate in approving applications where it considered the factor of competition "not in terms primarily as to benefit the public but specifically with the objective of equalizing competition among competitors").

[59] *See, e.g., OneComm Order* at ¶ 25.

[60] DOJ does not include cellular telephone service in the same product market as SMR because cellular service has historically been a higher priced service and also because cellular providers have traditionally been prohibited from offering dispatch-type services. CIS at 6.

[61] DOJ Proposed Final Judgment at 7.

[62] *See* Clark Comments at 6-10.

[63] Motorola Reply Comments at 8.

[64] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, FCC 94-271 , *Further Notice of Proposed Rule Making*, 59 Fed. Reg. 60,111 (Nov. 22, 1994).

[65] 47 C.F.R. § 90.609(b).

[66] *See* Sept. 27, 1993 letter from Chief, Private Radio Bureau to Gerald S. McGowan ("McGowan Letter"); *see also Fleet Call*, 6 FCC Rcd at 1536.

[67] *See Fleet Call*, 6 FCC Rcd at 1536.

[68] *See* Weisman Letter, *supra*, n.

[69] *See* Pettit Letter, *supra*, n.3 .G

[70] *Id.*

### C. Equal Access to Interexchange Carriers

25. *Background.* McCaw requests that we condition grant of Motorola's assignment applications on Nextel's provision of equal access to interexchange telecommunications service providers.[71] According to McCaw, imposing such a condition would put Nextel on equal footing with other providers of commercial mobile radio services – including McCaw and the cellular affiliates of the Bell Operating Companies – which are already subject to equal access requirements.[72]

26. *Discussion.* Currently, equal access obligations are imposed on the cellular affiliates of Bell Operating Companies and AT&T/McCaw, but are not imposed on other cellular and CMRS providers.[73] As Motorola and Nextel point out, the Commission is already examining the costs, technical implications and consumer benefits of imposing equal access requirements on CMRS providers in another proceeding.[74] In the *Equal Access NPRM*, the Commission specifically sought comment on whether "equal access obligations should be extended to any CMRS provider other than cellular carriers."[75] We agree with Motorola and Nextel, therefore, that the appropriate forum for addressing equal access requirements for SMR licensees is the Commission's Equal Access proceeding, and we will not prejudge the outcome of that proceeding here.[76] Thus, we do not condition our approval of Motorola's assignment on Nextel's provision of equal access to interexchange carriers.

## V. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(r), 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 303(r) and 310(d) and Section 90.153 of the Commission's rules, 47 C.F.R. § 90.153, that Motorola's application seeking consent to assign licenses to Nextel is GRANTED.

28. IT IS FURTHER ORDERED that Motorola and Nextel have one-hundred eighty days (180) days from the release date of this Order to provide notification that the underlying transaction has been consummated.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

### Appendix A

*January 12, 1995*

Letter to Commissioners from Gary N. Smith ("Smith Comments")

*January 13, 1995*

Clark Motion to Consolidate Actions

Comments of McCaw Cellular Communications, Inc.

Clark, *et al.*, Comments on Proposed Antitrust Final Judgment ("Clark Comments")

*January 20, 1995*

Nextel Reply Comments (DA 94-1567) ("Nextel Reply Comments")

Reply Comments of Motorola, Inc. ("Motorola Reply Comments")

Motorola Opposition to Motion to Consolidate Actions (DA 94-1567)

*February 1, 1995*

Clark Reply to Oppositions of Motorola and OneComm to Clarks' Motion to Consolidate Actions

*March 31, 1995*

Letter to Rosalind K. Allen, Acting Chief, Commercial Radio Division from Robert L. Pettit ("Pettit Letter")

### Appendix B

### Commission Documents Issued In This Proceeding

*Public Notice*, DA 94-1087, "Wireless Telecommunications Bureau Seeks Comment On Motorola's Request For Commission Consent to Assign Licenses to Nextel Communications, Inc.," DA 94-1567 (Dec. 21, 1994).

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[71] McCaw Comments at 1, 3-6.

[72] *Id.* at 1-2.

[73] Current equal access obligations, as they apply to the cellular affiliates of Bell Operating Companies, are a product of the Modified Final Judgment in the AT&T divestiture proceeding. Similar obligations that apply to AT&T/McCaw are the product of another agreement with the Department of Justice. Neither was established by any action of the Commission.

[74] Motorola Reply Comments at 12-13; Nextel Reply Comments at 21. *See also* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service, CC Docket No. 94-54, *Notice of Proposed Rule Making and Notice of Inquiry*, 9 FCC Rcd 5408 (1994) ("*Equal Access NPRM*").

[75] *Equal Access NPRM*, 9 FCC Rcd at 5431, ¶ 49.

[76] Motorola Reply Comments at 12; Nextel Reply Comments at 21.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**IB Docket No. 95-41**

In the Matter of

Amendment to the Commission's
Regulatory Policies Governing
Domestic Fixed Satellites and
Separate International Satellite
Systems

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: April 5, 1995; Released: April 25, 1995**

**Comment Date: June 8, 1995**
**Reply Comment Date: June 23, 1995**

By the Commission:

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## I. INTRODUCTION

1. This Notice of Proposed Rulemaking ("NPRM") proposes to eliminate the distinction between our Transborder Policy and Separate International Satellite Systems ("Separate Systems") Policy, and to treat all U.S.-licensed geostationary fixed-satellites under a single regulatory scheme. In so doing, we propose to permit all such U.S. fixed-satellites to provide domestic services and international services on a co-primary basis. We hope thereby to increase competition in fixed-satellite services by increasing the amount of satellite capacity available for both domestic and international use, and to eliminate regulations that impair businesses' ability to meet their customers' needs. We also solicit comment on whether this policy should be extended to other U.S.-licensed geostationary satellite systems, including those providing mobile satellite service ("MSS") and direct broadcast satellite ("DBS") service, and whether COMSAT, a U.S. licensee, should be permitted to provide domestic service using Intelsat and Inmarsat capacity.

2. We have initiated this proceeding in response to applications from two separate international satellite system licensees and one domestic satellite system licensee, all seeking authority to provide a full range of both domestic and international services.[1] The Executive Branch has also suggested that we treat domestic fixed-satellite transborder and separate systems services under the same regulatory framework.[2] Consequently, we consider here the extent to which these policies should be modified and applied to existing satellite licensees as well as newly-filed applications seeking to provide domestic and international services on a co-primary basis.

## II. BACKGROUND

3. The Transborder and Separate Systems Policies both involve the use of non-Intelsat satellites for the provision of international services. Both policies are based on the Communications Satellite Act of 1962 ("Satellite Act") which provides for U.S. participation in the global commercial communications satellite organization that became Intelsat. *See* 47 U.S.C. §§ 701-744. The Satellite Act does not, however, require Intelsat to be the sole provider of international satellite services involving the United States. Rather, it specifically provides that additional satellite systems may be authorized if "required to meet unique governmental needs or if otherwise required in the national interest."[3] The Transborder and Separate Systems Policies evolved from these general principles at different times and in response to different circumstances.

### A. *Transborder Policy*

4. The Commission licensed the first commercial U.S. domestic fixed-satellites in 1973, when five companies were authorized to construct systems that would provide fixed-

[1] Columbia Communications Corp. ("Columbia") and International Private Satellite Partners, L.P. d/b/a Orion Atlantic L.P. ("Orion") have applied to use their separate international satellite systems to provide domestic service. In addition, Hughes Communications Galaxy, Inc. ("Hughes") has applied to use its Galaxy III(H) domestic fixed-satellite to provide international service until its proposed separate systems satellite is authorized.

[2] *See* paragraphs 13 and 14 *infra*.

[3] *See* 47 U.S.C. § 701(d). Additionally, Congress has declared it to be U.S. policy "to make available to consumers a variety of communications satellite services utilizing the space segment facilities of Intelsat and any additional such facilities which are found to be in the national interest" and which are technically compatible with and avoid significant economic harm to the Intelsat system. Pub. L. No. 99-93, 99 Stat. 425 (1985) (quoted in Historical and Statutory Notes to 47 U.S.C.A. § 701).

satellite services solely within the United States.[4] In 1981, several domestic satellite operators (or "domsats") and resellers leasing capacity on these satellites filed applications to provide international public telecommunications services within the coverage areas ("footprints") of their satellites. Because this involved U.S. national interests and foreign policy objectives, including U.S. obligations toward Intelsat, we requested the Executive Branch's view on this subject. In response, the Executive Branch established an interagency task force, coordinated by the National Telecommunications and Information Administration (NTIA). The task force considered whether the use of domsats for international services would be consistent with U.S. commitments under the Intelsat Agreement and the continued integrity of the global system. Article XIV(d) of the Intelsat Agreement provides that any Party or Signatory that intends to establish, acquire, or utilize space segment facilities separate from Intelsat to meet its international public telecommunications requirements shall consult with Intelsat to ensure that the proposed use will be technically compatible with the Intelsat space segment and will not cause significant economic harm to the Intelsat global system. In a letter dated July 23, 1981 (the "Buckley Letter"),[5] the State Department said Article XIV(d) of the Intelsat Agreement recognizes that members may decide to rely on non-Intelsat space segment facilities and that:

> [c]ertain exceptional circumstances may exist where it would be in the interest of the United States to use domestic satellites for public international telecommunications with nearby countries. One such case would be where the global system could not provide the service required. Another case would be where the service planned would be clearly uneconomical or impractical using the Intelsat system. In such cases, the United States commitment to the global system would not preclude reliance on domestic satellite facilities. However, the burden of proof for demonstrating that sound technical, operational or economic reasons warrant reliance on domestic satellites for international purposes must rest with proponents of such use.

The letter also specified that all international operations using domsats must be coordinated with Intelsat under Article XIV(d) of the Intelsat Agreement. The Buckley Letter concluded that "no national or foreign policy interest bars the Commission's consideration of whether the public convenience and necessity would be served by use of the domestic space segment in these cases."

5. The Buckley Letter thus formed the basis of the Transborder Policy under which U.S. domestic fixed-satellites (domsats) may provide international services where: 1) Intelsat cannot provide the service; or 2) it would be clearly uneconomical or impractical to use Intelsat facilities. Based on the Transborder Policy and our consideration of the public interest, we have approved applications to use U.S. domsats to provide certain international services conditioned on successful coordination with Intelsat and the concurrence with other involved countries.[6] Most have involved instances where use of the Intelsat system would be clearly uneconomical or impractical. For example, we have permitted domsats to provide video programming to nearby countries within their coverage areas.[7] Requiring the service provider to use Intelsat in such instances would require multiple satellite hops, terrestrial facilities, and co-located domestic and international earth stations, which would significantly increase the cost of providing the service.[8] We found it unlikely that U.S. programmers would duplicate their networks over the Intelsat system or that customers in other countries would pay the added costs of service if they were required to use the Intelsat system.[9] Similarly, we have allowed businesses using U.S. domsats for domestic traffic to add links to international locations as an adjunct to their primarily domestic satellite networks. We have found that requiring such companies to use Intelsat for their international links would require them to duplicate an already adequate communications network, resulting in an unnecessary and significant expense. In other words, we have found the "uneconomical or impractical" prong of the Buckley Letter criteria is met where the extension of an existing domestic network is involved, and where the international links are covered by the footprint of a U.S. domsat.

6. Although most of the services we have authorized under the Transborder Policy have been "incidental" to domestic services already being provided, U.S. domsats have provided more extensive services between the U.S. and Mexico and between the U.S. and Canada because Intelsat has not traditionally provided service between the U.S. and these points. For example, in addition to allowing existing domestic networks to extend their coverage into Canada and Mexico, we have also permitted point-to-point (two-way) services between the United States and these countries. In doing so, we recognized that services between the U.S. and these locations were already being provided via well-developed terrestrial systems, and that use of domestic satellites for these services would compete with these terrestrial systems rather than with Intelsat. Thus, a wider range of services was permitted between the U.S. and contiguous locations (*i.e.*, Canada and Mexico) than between the U.S. and non-contiguous locations.

7. Indeed, the U.S. Court of Appeals for the District of Columbia Circuit has interpreted the Buckley Letter, as applied by the Commission, to circumscribe the scope of services permitted between the U.S. and non-contiguous

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[4] Domestic Communication Satellite Facilities, 22 F.C.C. 2d 86 (1970)(*Domsat I*); 35 F.C.C. 2d 844 (1972), *recon. in part*, 38 F.C.C. 2d 665 (1972); American Telephone and Telegraph Co., 42 F.C.C. 2d 654 (1973); Communications Satellite Corp., 42 F.C.C. 2d 677 (1973); GTE Satellite Corporation, 43 F.C.C. 2d 1141 (1973); RCA Global Communications, 42 F.C.C. 2d 774 (1973); Western Union Telegraph Co. 38 F.C.C. 2d 1197 (1973).

[5] Letter from James L. Buckley, Under Secretary of State for Security Assistance, Science and Technology, to F.C.C. Chairman Mark Fowler (July 23, 1981) (printed in Appendix to Transborder Satellite Video Services, 88 F.C.C. 2d 258, 287 (1981)).

[6] Transborder Satellite Video Services, 88 F.C.C. 2d 258 (1981); Satellite Business Systems, 88 F.C.C. 2d 195 (1981); American Satellite Company, 88 F.C.C.2d 178 (1981).

[7] Transborder Satellite Video Services, *supra*.

[8] *Id.* at 280.

[9] *Id.* at 281.

locations.[10] In *Jamaica Teleport*, the court determined that a Commission authorization permitting use of a domsat system for the provision of private-line services between the U.S. and Jamaica was not adequately justified under the "uneconomical or impractical" prong of the Buckley Letter even though the proposed service had been successfully consulted under Article XIV(d) of the Intelsat Agreement. The court, in remanding, noted that Commission decisions applying the "uneconomical or impractical" prong of the Buckley Letter had always involved a qualitative component, such as eliminating the need for duplicative facilities, multiple satellite hops, and additional terrestrial links.[11] The court also questioned the Commission's determination that service could be deemed "uneconomical" strictly on a cost comparison between Intelsat and non-Intelsat capacity.[12] Thus, *Jamaica Teleport* created uncertainty as to whether expanded domsat service between the U.S. and non-contiguous locations would be permissible absent a showing that these services involve the extension of a domestic network or would involve multiple satellite hops or additional terrestrial links.

8. Another significant feature of the Transborder Policy is that it does not prohibit voice services through the public switched network ("PSN"), as has our Separate Systems Policy discussed below. The criteria in the Buckley Letter ensure that Intelsat will not suffer significant economic harm. So, we have not imposed specific service restrictions on transborder operations. Until recent modifications in the Separate Systems Policy permitting interconnection with the PSN, the ability of domsats to provide public switched services under the Transborder Policy was the main distinguishing feature between the two policies.

9. Transborder and separate systems operations differ significantly with respect to the scope of technical coordination required. Transborder services are incidental to the provision of domestic services and are provided protection based on coordination of U.S. domsats for domestic services since they cannot cause any more interference than a coordinated U.S. domestic service. In contrast, technical coordinations for separate system satellites are more difficult because all points of communications are required to be coordinated to ensure that there is no unacceptable interference to satellite systems of other countries.

**B. *Separate Systems Policy.***

10. The Commission established its Separate Systems Policy in response to a 1984 Presidential Determination that satellite systems separate from Intelsat, providing service between the U.S. and international points, "are required in the national interest."[13] The Presidential Determination was made after Executive Branch review of proposals before the Commission to establish such separate systems. It directed the Secretaries of State and Commerce to inform the Commission of the criteria necessary to ensure that the United States meets its international obligations and furthers its telecommunications and foreign policy interests. In a letter dated November 28, 1984, the Secretaries of State and Commerce jointly advised the Commission to authorize separate systems provided that (1) each system be restricted to providing services through the sale or long-term lease of capacity for communications not interconnected with public switched message networks (except for emergency restoration service);[14] and (2) each system gain approval from the foreign authority with which communications links are being established and enter into consultation procedures in accordance with Article XIV(d) of the Intelsat Agreement to ensure technical compatibility and to avoid significant economic harm to Intelsat.[15]

11. In 1985, we authorized several applicants to build separate satellite systems to provide international public telecommunications services under these conditions.[16] At the time, we recognized that some of the proposed separate system satellites were to be configured in such a way as to permit the satellite to be switched from international use to primarily domestic use.[17] Since many of the orbital positions requested by separate systems applicants were deemed to be critical, limited resources for the provision of particular international services, we decided we would not permit separate systems operators to divert this capacity for domestic communications. Further, because the Commission's financial and technical requirements for domsats were different than those for separate systems, we wanted to ensure that those providing domestic service met the domsat requirements.[18]

12. Nevertheless, we permitted separate system licensees to provide domestic service within the U.S. on an "ancillary" basis.[19] This permits licensees to use their separate system facilities for domestic communications that are reasonably related to their use of the facilities for international communications. This was intended to accommodate those international customers who have limited domestic communications needs related to theirinternational uses.[20]

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[10] Communications Satellite Corporation v. F.C.C., 836 F. 2d 623 (D.C. Cir. 1988)(*"Jamaica Teleport"*).

[11] *Id.* at 633.

[12] There was no Commission decision on remand of the *Jamaica Teleport* decision because, following the appeal, the applicants requested dismissal of the application without prejudice. *See* Teleport International Ltd., 3 FCC Rcd 3157 (1988).

[13] Presidential Determination No. 85-2 (Nov. 28, 1984), 49 Fed. Reg. 46,987. The Separate Systems Policy is written into law as part of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub.L. No. 99-93, § 146(g), 99 Stat. at 426.

[14] At the time, the restriction against interconnection with the PSN was deemed necessary to protect the core revenue base of Intelsat which consisted of switched voice and other services.

[15] Letter from George P. Shultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to F.C.C. Chairman Mark S. Fowler (Nov. 28, 1984).

[16] Establishment of Satellite Systems Providing International Communications, 101 F.C.C. 2d 1046 (1985)(*"Separate Systems Decision"*), *recon.*, 61 RR 2d 649 (1986), *further recon.*, 1 F.C.C. Rcd 439 (1986).

[17] Separate Systems Decision, 101 F.C.C.2d 1172, note 162.

[18] *Id. See* paras. 26-29, *infra* for a discussion of these qualification requirements.

[19] Separate Systems Decision, *recon.*, 61 RR2d at 667.

[20] *Id.* For example, a U.S. video user or reseller may desire to bring in from Europe an end-of-day raw news feed at about noon U.S. time for editing and then retransmit the European-originated tape to U.S. receive points five or six hours later for evening newscasts in the U.S. Similarly, a Los Angeles-based program producer may wish to use a separate system to trans-

C. *Recent Developments.*

13. Since we first began to license separate systems, Intelsat has continued to evaluate the risk of economic harm posed by these systems and has concluded that the provision of limited switched services over systems consulted under Article XIV(d) would not cause it significant economic harm.[21] The Executive Branch advised us to modify our Separate Systems Policy accordingly. The cumulative effect of these modifications is a phased relaxation of the restrictions against interconnection with the PSN--from no circuits in 1985 to 8,000 circuits today --with a goal of complete elimination of all interconnection restrictions by January 1997.[22]

14. As for the Transborder Policy, the Departments of State and Commerce informed the Commission in 1991 that: "[t]o the extent these modified [interconnection] criteria relax restrictions imposed for international use of domestic satellites, they may also be used in place of the conditions identified by the [Buckley Letter].[23] Further, in its January 8, 1993 letter advising the Commission that an increased number of interconnected circuits should be permitted under the Separate Systems Policy, the Executive Branch noted that its policy modification "supersedes the conditions identified by the [Buckley Letter] concerning international use of domestic satellites, as did the November 27, 1991 letter. The criteria set forth in the [Buckley Letter] will continue to be applicable only for public switched services above the [then applicable] twelve-hundred and fifty circuit threshold."[24]

15. Most recently, we have received three applications that have prompted us to initiate this proceeding. Hughes seeks to modify its current authority to operate its hybrid (combined C and Ku-band) domestic satellite known as Galaxy III(H), located at 95° W.L., to permit switchable coverage of either the United States or Mexico, the Caribbean and Latin America until its proposed separate system satellite is authorized.[25] Hughes also seeks authority to use its Ku-band capacity for international fixed satellite services. Columbia seeks modification of its existing authority to operate its separate international satellite system consisting of two satellites located at 174° W.L. and 41° W.L. in order to provide a full range of domestic telecommunications services[26] Orion requests modification of its authorization to operate its international satellite located at 37.5° W.L. (Orion 1) to provide a full range of domestic communications services, including switched services, using six of its thirty-four Ku-band transponders.[27] We expect to receive additional applications requesting similar authority.

## III. DISCUSSION

16. Since our Transborder and Separate Systems Policies were developed in the 1980s, there has been an increasing trend towards a globalized economy. Corporations are becoming increasingly multinational in character, including most of the major U.S. corporations. The communications requirements of these corporations have changed accordingly, reflecting a desire for "one-stop" shopping. Users whose communications requirements were once wholly domestic now find they need international space segment capacity to satisfy private-line and other two-way service requirements. Yet their current service providers--domsats--may not be able to meet these needs under the Transborder Policy. Similarly, separate system customers might be unable to serve U.S. domestic locations because of the "ancillary" service restriction in our Separate Systems Policy. Although we could attempt to address these situations through *ad hoc* expansions of Transborder and Separate Systems Policies, we do not believe that the uncertainty and possible delay associated with our current policies benefit U.S. users or service providers.

17. Given the globalization of communications needs, we do not believe it advisable to administer two separate policies when U.S. space station operators seek to offer similar services to similar geographic areas. Rather, we believe the public interest would be best served by modifying our policies to reflect the global nature of the telecommunications needs today. The recent letters from the Executive Branch provide a basis for pursuing changes that will result in all U.S.-licensed satellites being governed by the same policy guidelines. We therefore propose to eliminate the Transborder Policy in its entirety, including the Buckley Letter criteria, and to treat all U.S. domestic fixed-satellite licensees on the same basis as U.S. separate international satellite system licensees, allowing them to provide both domestic and international communications, subject to the modifications to the Separate Systems Policy proposed here.

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mit programming at 9:00 p.m. west coast time to New York (midnight east coast time) and to transmit at a later hour for receipt in Europe.

[21] Most recently, the Nineteenth Assembly of Parties of Intelsat determined that the interconnection of up to 8,000 64-kbps equivalent circuits via each separate system satellite would not cause significant economic harm to the Intelsat system. The Executive Branch has not yet notified the Commission that the Separate Systems Policy should be modified accordingly.

[22] *See* Letter from Thomas J. Murrin, Deputy Secretary of Commerce, and Lawrence S. Eagleburger, Deputy Secretary of State, to F.C.C. Chairman Alfred C. Sikes (December 14, 1990)(100 64-kbps circuits consistent with U.S. obligations). Letter from James Baker, Secretary of State, and Robert Mosbacher, Secretary of Commerce, to F.C.C. Chairman Sikes (November 27, 1991) (interconnection of private lines to the PSN consistent with U.S. obligations and U.S. goal of complete elimination of PSN interconnection restrictions by January 1997). Letter from Bradley P. Holmes, United States Coordinator for International Communications and Information Policy, Department of State, and Gregory L. Chapados, Assistant Secretary, Department of Commerce, to F.C.C. Chairman Sikes (January 8, 1993)(1,250 64-kbps circuits consistent with U.S. obligations). *See also* Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (Intelsat), 7 F.C.C. Rcd 2313 (1992), *further modification*, 9 F.C.C. Rcd 347 (1994); Alpha Lyracom d/b/a Pan American Satellite, et al., 9 F.C.C. Rcd 1282 (1994)(*"PAS Modification Order"*).

[23] Letter from James Baker, Secretary of State, and Robert Mosbacher, Secretary of Commerce, to F.C.C. Chairman Alfred C. Sikes (November 27, 1991).

[24] Letter from Bradley P. Holmes, United States Coordinator for International Communications and Information Policy, Department of State, and Gregory L. Chapados, Assistant Secretary for Communications and Information, Department of Commerce, to F.C.C. Chairman Alfred C. Sikes (January 8, 1993).

[25] Application File No. CSS-94-014-ML.

[26] Application File No. CSS-94-020-ML.

[27] Application File No. CSS-95-001-ML.

A. *Elimination of the Transborder Policy.*

18. The Separate Systems Policy currently permits U.S. separate systems licensees to provide internationally: (1) all services not interconnected with the PSN (including private-line services and video and audio transmission services); (2) up to 1,250 64-kbps equivalent circuits interconnected with the PSN per satellite; (3) emergency restoration services; and (4) private line services interconnected with the PSN, which permit private line customers to use a single system of customer premises equipment (both telephone and computer) to access a mix of switched and non-switched telecommunications services. We propose to eliminate the Buckley Letter criteria to permit domsat licensees to also provide these international services without regard to whether these services are incidental to an existing domestic network or whether Intelsat could provide the service. Consequently, subject to the approval of the affected foreign country and successful consultation with Intelsat and ITU[28] coordination with other administrations with satellite systems that may be affected, domsats would be able to provide services between the U.S. and non-contiguous points on the same basis as separate systems.[29]

19. While the State Department's January 8, 1993 letter suggests that the Buckley Letter criteria should remain in effect where more than 1,250 circuits are involved, we propose to eliminate this benchmark. First, the Buckley Letter never restricted interconnection to the PSN, and therefore we question whether the number of interconnected circuits was ever relevant in applying the Transborder Policy. In any event, in light of Intelsat's recent determination that 8,000 circuits per satellite may be interconnected to the PSN without an economic harm consultation, we presume that the State Department would have us use this number as the trigger for applying the Buckley Letter criteria today. The 8,000 circuit level will allow virtually all of a satellite's capacity to be used for switched services, making it unlikely that the Buckley Letter criteria would ever need to be applied. Consequently, we propose to eliminate the Transborder Policy under all circumstances. We seek comment on these tentative conclusions and on the consistency of our proposal with U.S. obligations under the Intelsat Agreement.

B. *Modification of the Separate Systems Policy.*

20. Although eliminating the Buckley Letter criteria would remove artificial service limitations on domsats, it would also give domestic satellite providers an advantage over U.S. separate systems providers without further modifications to the Separate Systems Policy. Whereas U.S. domestic satellite system providers would be relatively unfettered in their provision of domestic and international services, U.S. separate satellite system providers would still be limited to the provision of U.S. domestic service on an "ancillary" basis.[30] Although the Executive Branch's letters did not specifically address this issue, we believe that a natural corollary to subjecting both domestic satellites and separate systems satellites to the same international service restrictions is to eliminate the restriction that separate systems providers be limited to providing domestic service on an "ancillary" basis.

21. We tentatively find that eliminating the "ancillary" restriction on separate systems operators and permitting all U.S.-licensed satellite operators to provide domestic and international services on a co-primary basis would further the public interest. Permitting all operators to provide the widest range of service offerings technically feasible and consulted by Intelsat will permit them to use their satellites more efficiently and to provide innovative and customer-tailored services. This should, in turn, benefit consumers by increasing service options, lowering prices, and facilitating the creation of a global information infrastructure. It will also help to avoid shortages of space segment capacity in the event of a launch failure or other catastrophic event. The domsat industry is now well established and there is sufficient international satellite capacity available via Intelsat, U.S. separate systems and non-U.S. satellite systems to satisfy customers' needs. We also note that several entities have been licensed to construct, launch and operate satellite systems that will provide mobile-satellite services, together with fixed-satellite services within the U.S. Thus, we believe that there is no longer any reason to impose restrictions on either providers of domestic or international satellite capacity outside of the single regulatory scheme we propose.

22. Because existing geostationary domestic fixed-satellites occupy orbital locations best suited for domestic service and separate system satellites occupy orbital locations best suited for international service, these policy changes are not likely to result in full competition between in-orbit domestic and international systems in the near term.[31] Newer generations of satellites, however, can be better configured to provide both international and domestic services on a co-primary basis. We believe the policy that we are proposing will give U.S. satellite providers flexibility to design systems that are most responsive to customer needs and changing market conditions. We seek comment on this tentative conclusion.

C. *Impact on Intelsat.*

23. Under our proposal, all satellites providing international service will still require consultation with Intelsat under Article XIV(d) to prevent technical or significant economic harm. Intelsat has already streamlined its Article XIV(d) consultation process in considering the economic implications of proposed satellite systems. Intelsat has adopted a presumption that no economic harm will result from separate systems that provide non-public switched services or provide no more than 8,000 64-kbps equivalent bearer circuits interconnected with the PSN per satellite for the provision of switched interconnected services. Use of U.S. domsats for these services should continue to fall well

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[28] The ITU (International Telecommunications Union) is a specialized agency of the United Nations whose goal is to promote international cooperation in the efficient use of telecommunications, including the use of the radio frequency spectrum.

[29] Any domsat operators that need to change the technical parameters of their proposed or authorized satellites in order to provide co-primary international service must file a request to amend the application or modify the license under Part 25 procedures. 47 C.F.R. Part 25.

[30] Separate Systems Decision, *recon .*, 61 RR2d at 667.

[31] Intelsat satellites are located over Atlantic, Pacific and Indian Ocean regions, which are optimal locations from which to provide international services.

within these benchmarks for a number of reasons. First, the most significant competition to Intelsat is likely to occur in the provision of point-to-point and other two-way video and data services between the U.S. and other countries, which is now permitted only with respect to Canada and Mexico. We do not expect these services to include a significant amount of switched voice services, which remains Intelsat's core revenue base. Second, Intelsat has already determined that the use of U.S. domsats for the provision of private-line and other two-way services between the U.S. and certain Latin American/Caribbean locations will not cause it significant economic harm.[32] Third, although the Transborder Policy has never restricted interconnection with the PSN, domsat operators have typically not sought to provide switched services over these systems. Indeed, only one consultation involved switched services and, in that case, the applicant sought to provide interconnection with the PSN only in one country. Fourth, Intelsat has not been adversely affected by the arrival of other potential competitors, such as our existing separate systems. In fact, Intelsat's continued evaluation of separate systems has resulted in determinations that interconnection to the PSN of increased numbers of separate systems circuits would not result in significant economic harm to it. While newer generations of geostationary orbit satellites may be better configured to provide both domestic and international services, all satellites are somewhat constrained by their orbital locations and their footprints.

24. Significantly, Intelsat does not recognize a difference between U.S. domestic satellites and separate system satellites consulted under Article XIV(d) for international services. Rather, Article XIV(d) requires consultations for satellite systems providing international service "separate" from Intelsat. Accordingly, we tentatively conclude that U.S. obligations toward Intelsat provide no reason to maintain a distinction with respect to our regulatory treatment of these systems.

**D.** ***Changes to Other Policies and Rules.***

25. The policy changes we propose will require certain changes to Part 25 of our rules. Initially, we propose to eliminate all references to "transborder", "domestic", "separate" and "international" satellite systems. These references are found in Sections 25.110(b), 25.113(b) and (d), 25.114(c), 25.115(c), 25.117(a), 25.130(d), 25.131(b), (g) and (j), 25.140(a) and (b), 25.202(c), 25.210(e), (f) and (j), 25.211(b) and 25.276(c). We also propose to reconcile differences in the financial qualification requirements for domsats and separate systems, allow all U.S.-licensed satellite system operators to elect whether they will operate on a common carrier or non-common carrier basis, and make modifications to our earth station licensing procedures. Finally, because the recent changes to Part 25 require separate system operators to meet the same technical standards as domsat operators, we propose to eliminate Section 25.210(f) which permits exceptions to the technical requirements in accordance with the *Separate Systems Decision*.[33]

**1.** ***Financial Qualifications.***

26. Domsats and separate systems are now subject to somewhat different financial qualification standards. The domsat standard requires evidence of full financing before a license is awarded.[34] This stricter standard is based on the Commission's repeated experience that licensees without sufficient available resources spend a significant amount of time attempting to raise the necessary financing, and those attempts often end unsuccessfully. Since applications to implement domsats regularly exceed the number of available orbital locations, the domsat standard was designed to ensure that a grant to an underfinanced applicant would not delay service to the public by precluding a fully capitalized applicant from implementing its plans.

27. While separate satellite system operators must ultimately demonstrate the same level of financial commitment, they are permitted to make their financial showings in two stages, to accommodate the unique circumstances applicable to separate systems. Separate systems must complete the Intelsat Article XIV(d) consultation process before they are permitted to provide international service. However, in order to formally initiate the consultation process, an applicant must first obtain an agreement from a foreign country to operate with the proposed system. We concluded that an applicant would need some kind of preliminary authorization from the Commission in order to procure an agreement with another country. Moreover, we realized that the uncertainties inherent in this process made it unlikely that an applicant would receive an irrevocable commitment from any banking or financial institution until the consultation process was completed.[35]

28. Consequently, we currently issue a conditional construction permit to separate systems applicants that show: (1) the estimated costs of proposed construction and launch and any other initial expenses for the proposed space station(s); (2) the estimated operating expenses for one year after launch of the proposed space station(s); and (3) the source(s) or potential source(s) of funding of the proposed system for one year, which would include the identity of financiers and their letters of financial interest. This permit does not allow applicants to begin construction, but sets forth the technical parameters of the proposed system to facilitate Article XIV(d) consultation and to assist applicants in obtaining foreign approvals for proposed system. Upon completion of the Intelsat Article XIV(d) process, permittees may apply for final authorization. That application must include evidence that the permittee satisfies the "domsat" financial standard, that is, that it has full, committed financing. Permittees not meeting this standard will not receive licenses.[36]

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[32] *See* Intelsat Board of Governors document BG-94-81 (September 10, 1992).

[33] *See* 47 C.F.R. §§ 25.210(a)-(j) and the proposed rules set forth in Appendix 2.

[34] Licensing Space Stations in the Domestic-Fixed Satellite Service, 50 Fed. Reg. 36071 (Sept. 5, 1985) ("*1985 Processing Order*"). *See also* 47 C.F.R. § 25.140(d) which requires domsat applicants to demonstrate current assets (which includes cash, inventory, accounts receivable) or irrevocably committed external debt or equity financing sufficient to cover construction, launch and first year operating costs.

[35] Separate Systems Decision, 101 F.C.C.2d at 1164.

[36] *Id.* at 1165-66.

29. We believe the policy changes proposed herein will eliminate the necessity for a two-stage financial qualification showing by any applicant proposing to implement a U.S.-licensed fixed-satellite. Since all U.S.-licensed fixed satellites will be permitted to provide domestic and international service on a co-primary basis, all applicants should be able to obtain financial commitments based on the justified expectation of revenues from the provision of domestic service. Moreover, the recent changes in the Intelsat Article XIV(d) process have removed most of the uncertainty with respect to gaining consent from foreign countries and completing consultation successfully.[37] We request comment on elimination of the two-stage process now applied to separate systems in favor of the one stage process currently applicable to domsats.

**2. *Regulatory Classification.***

30. Initially, all domsats were licensed to provide services on a common carrier basis. Shortly thereafter, domsat operators initiated requests to provide service on a non-common carrier basis to various customers. Based on the long lead time associated with constructing and launching a satellite (approximately three years), the cost (today $218-$400 million), and the customer's need to be confident it will have access to space station capacity that meets its particular needs at a set price during the lifetime of the satellite, the Commission found that transponder sales or long-term leases would "benefit all participants in the domestic satellite industry."[38] Consequently, the Commission established its "Transponder Sales" policy, which allows domsat operators to sell or lease transponders on a non-common carrier basis upon a finding that granting a particular sales request will not unduly reduce the number of transponders available on a common carrier basis.[39] In evaluating a particular sales request, we rely upon the analysis set forth in *NARUC I.*[40] *NARUC I* identified two criteria as determinative of whether a service may be provided on a non-common carrier basis: (1) whether there is or should be any legal compulsion to serve the public indifferently and, if not, (2). whether there are reasons implicit in the nature of the service to expect an indifferent holding out to the eligible user public.

31. We no longer see any need to require any U.S.-licensed space station licensee wishing to tailor its offerings to the individual requirements of its customers to provide any amount of its spacecraft's capacity on a common carrier basis. With respect to the first prong of *NARUC I,* we find no legal compulsion for any U.S. licensees to serve the public indifferently. Thirty domsats are now in orbit and, if we adopt our proposal to allow separate systems to provide domestic service, thirty-five satellites will be available to customers to satisfy their domestic fixed-satellite communications needs. Further, several entities have been licensed to construct and launch satellite systems that will provide mobile-satellite services, together with fixed-satellite services, within the United States.[41] Consequently, we believe that sufficient competitive capacity is and will continue to be available to assure the U.S. public of ample access to fixed-satellite services. Significantly, no transponder sales application has been opposed in the past decade. Despite near-routine approval of these sales requests, several operators have nevertheless chosen to continue to offer space segment capacity on a common carrier basis. We expect this to continue. With respect to the second prong of *NARUC I,* we have already found little likelihood that non-common carrier domsats will hold themselves out indifferently to serve the public and that stable, long-term contractual offerings to individual customers of technically and operationally distinct portions of a satellite fall far short of the indiscriminate offering contemplated in *NARUC I.*[42]

32. As for separate systems, we determined in 1985 that they would operate on a non-common carrier basis primarily because of the Executive Branch's original restriction that space segment capacity be provided on a "sale or long-term lease" basis for communications not interconnected to the public switched message networks, *i.e.,* "customized services."[43] However, subsequent modifications to those restrictions have eroded the basis for requiring that these systems operate on a non-common carrier basis. The "no-interconnection" restriction is being phased out and the "sale or long-term lease" restriction has been replaced with the requirement that services be provided by "sale or lease."[44] These modifications make clear that use of these systems is no longer limited to the provision of "customized" services. In light of these developments, we see no reason to prohibit any U.S. space station licensees from providing common carrier service if these, offerings further its business plans.

33. Accordingly, we tentatively conclude that there is no reason to continue to impose limitations on the manner in which U.S.-licensed operators may offer service to the public. We instead propose to allow licensees and applicants to elect whether to provide service on a common carrier or

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[37] Under current Intelsat consultation procedures, once a satellite is consulted for one location, it is deemed consulted for all locations as long as its operations are consistent with the original technical parameters consulted.

[38] Domestic Fixed-Satellite Transponder Sales, 90 F.C.C.2d 1238, 1252 (1982), aff'd *sub nom.,* Wold Communications, Inc. v. F.C.C., 735 F.2d 1465 (D.C Cir. 1984), *modified* Martin Marietta Communications Systems, 60 RR2d 779 (1986).

[39] Domestic Fixed-Satellite Transponder Sales, 90 F.C.C.2d at 1255 (1982).

[40] Nat'l Ass'n of Regulatory Utility Commissioners v. F.C.C., 525 F.2d 630 (D.C. Cir.), *cert. denied,* 425 U.S. 992 (1976).

[41] American Mobile Satellite Corporation, 4 F.C.C. Rcd 6041 (1989); Orbital Communications Corporation, 9 F.C.C. Rcd 6476 (1994); Loral/Qualcomm Partnership, L.P., DA 95-128 (released January 31, 1995); Motorola Satellite Communications, Inc., DA 95-131 (released January 31, 1995); TRW Inc., DA 95-130 (released January 31, 1995).

[42] Domestic Fixed Satellite Transponder Sales, 90 F.C.C.2d at 1257.

[43] Separate Systems Decision, 101 F.C.C.2d at 1102-03.

[44] *See* Letter from Thomas J. Murrin, Deputy Secretary of Commerce, and Lawrence S. Eagleburger, Deputy Secretary of State, to F.C.C. Chairman Alfred C. Sikes (December 14, 1990)(stating that interconnection of 100 64-kbps equivalent circuits per system would be consistent with U.S. international obligations and in furtherance of U.S. telecommunications and foreign policy interests); Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (Intelsat), 7 F.C.C. Rcd 2313 (1992).

non-common carrier basis.[45] We will, however, continue to monitor this situation and will revisit the issue if it appears that the public is not being adequately served. We request comment on this proposal.

**3.** ***Earth Station Licensing***

34. Under our current licensing scheme, earth stations are classified as either domestic or international depending on the satellites that will be accessed. Domestic earth stations are typically licensed to communicate with all domestic satellites in the domestic portion of the orbital arc, also referred to as "ALSAT, for domestic services." A domestic earth station so licensed has also been permitted to communicate with those satellites to provide international communications services, provided: (1) consultations pursuant to Article XIV(d) have been completed for the satellites, services and countries involved; and (2) the satellite operators have received specific authorization to provide the services to the proposed locations. A license modification is currently required if a domestic earth station operator seeks to add Intelsat or any other non-U.S. satellites as a point of communication on its license for international services.

35. On the other hand, international earth stations are licensed to communicate with specific U.S.-licensed and non-U.S. international satellites. Most license modification applications relating to international earth stations seek authority to access additional international satellites.

36. If, as proposed, U.S.-licensed space station operators are permitted to offer both domestic and international service, we see no reason to retain any distinction between domestic and international earth stations using U.S.-licensed space segment. We propose to retain the "ALSAT" designation to identify the satellites with which earth stations would communicate, but would broaden its meaning to include all U.S.-licensed fixed-satellites.[46] Thus, an earth station applicant specifying "ALSAT" would have the authority to communicate with all current U.S. domestic and international fixed-satellites, as well as all future U.S.-licensed fixed-satellites, to provide service between the U.S. and all countries consulted under Article XIV(d). Expanding the "ALSAT" designation will have the added benefit of reducing the number of license modification applications to be processed and allowing operators to provide service immediately consistent with Article XIV(d) consultations. We recognize, however, that this could affect the coordination requirements of earth stations with terrestrial facilities in the 4/6 GHz band. We seek comment on these tentative conclusions.

**E.** ***Other Issues.***

37. While U.S.-licensed satellite systems providing services other than domestic fixed-satellite services have never been subject to the Transborder Policy, they may be similarly constrained in the geographic reach of their services. Licenses awarded to geostationary satellites in the mobile-satellite service and in the direct broadcast service limit operators to serving domestic and off-shore areas.[47] In contrast, our rules require low-Earth orbit (LEO) satellite systems, which provide many of the same services, to be capable of serving all areas of the world.[48] Consequently, LEO system licensees may provide service to any country authorizing it to do so without further Commission action. Further, our proposal here would permit other geostationary fixed-satellite service systems to provide both domestic and international service without the regulatory delays associated with a license modification request.[49]

38. We therefore solicit comment as to whether licensees of1geostationary systems that provide mobile and broadcast services should be permitted to provide both domestic and international services on a co-primary basis, subject, of course, to U.S. international coordination obligations.[50] Such treatment appears to foster the same goals as eliminating geographic restrictions for U.S. fixed-satellites -- increased competition, increased consumer choices, and further development of the global information infrastructure. Nevertheless, we recognize there may be considerations unique to other services in different frequency bands that may mandate a different result. For example, DBS orbital locations have been assigned internationally to various countries through a "plan" adopted at the 1983 Regional Administrative Radio Conference.[51] Would a decision to allow U.S.-licensed DBS operators to serve international points be inconsistent with this "plan"? Would the receipt of programming from locations outside the U.S. be inconsistent with ITU Appendix 30A regarding feeder links for DBS at 12 GHz. We request comment on all issues relating to whether, and to what extent, all

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[45] Those licensees choosing to operate on a common carrier basis will, of course, continue to be subject to Title II and Section 310(b) of the Communications Act.

[46] Earth stations operating at 4/6 GHz will, of course, have to submit frequency coordination studies to support communications with the additional U.S. satellites, whether separate systems or domsats.

[47] *See, e.g.,* Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, 4 F.C.C. Rcd 6041 (1989) (authorizing American Mobile Satellite Corporation to provide domestic land, maritime and aeronautical service and to operate in U.S. coastal areas up to 200 miles off-shore); Continental Satellite Corp., *et al,* 4 F.C.C. Rcd 6292 (1989)(authorizing seven companies to provide DBS service to the continental United States).

[48] 47 C.F.R. § 25.143(b)(2)(i). *See* Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 F.C.C. Rcd 5936 (1994).

[49] DBS permittee, Direct Broadcasting Satellite Corporation, has filed an application to provide DBS service to Central and South America, and parts of Western Europe and Northern Africa from its satellite to be located at 61.5 degrees W.L. and to a large segment of the Pacific Rim from its satellite to be located at 175 degrees W.L. (File No. DBS-88-08/94-13DR).

[50] In this regard, we note that the provision of domestic aeronautical mobile satellite services via Inmarsat is also being addressed in a separate NPRM. *See* Petition for Reconsideration and Waiver of Provision of Aeronautical Services via Inmarsat (CC Doc. 87-75).

[51] Regional Administrative Radio Conference for the Planning in Region 2 of Broadcast Satellite Service in the Frequency Band 17.3-17.8 GHz, Geneva, 1983. This plan was included in the Radio Regulations, First Session of the World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It, Geneva 1985 (ORB-85). *See* ITU Radio Regulations, Appendix 30.

U.S.-licensed geostationary satellite systems should be permitted to provide both domestic and international services.

39. We reach no tentative conclusion as to whether COMSAT, a U.S. licensee, should be permitted to provide domestic service using Intelsat capacity.[52] We also make no proposal at this time as to the extent to which Inmarsat should be permitted to serve the U.S. market, recognizing that we have not yet reached a coordination agreement ensuring sufficient spectrum for geostationary U.S. MSS licensee, American Mobile Satellite Corporation. We invite comment on these issues and on whether, and under what conditions, non-U.S. satellites should be permitted to serve the U.S. domestic market. We specifically request comment on whether more rigorous technical requirements applicable to U.S.-licensed satellites, such as 2° spacing, should be imposed on non-U.S. satellites.

40. The issues discussed above are not intended to represent the full range of considerations involved in implementing the proposed policy changes. We therefore invite all interested parties to comment on any other issues raised by the proposed changes, including considerations as to how the proposed changes will affect orbital assignments, 2° orbital spacing between U.S. satellites in the geostationary orbit, the need to reopen coordination with satellite systems from other countries, and whether any special requirements should be placed on satellite operators providing both domestic and international service.

## IV. CONCLUSION

41. In this *Notice* we tentatively conclude that the public interest requires that all U.S.-licensed fixed-satellites be subject to the same regulatory policy for the provision of both domestic and international services. Therefore, we propose to eliminate the Transborder Policy and treat all U.S.-licensed fixed satellites under our Separate Systems Policy as modified. Elimination of the "ancillary" restriction will permit both domsat operators and separate satellite operators to provide both domestic and international services on a co-primary basis. We request comments on the issues and proposals addressed in this *Notice* and encourage full participation of domestic and international satellite providers and users.

42. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A, Section II. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice see* Appendix A, Section III), but they must have a separate and distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for the Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1980).

## V. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory action described above and that COMMENT IS SOUGHT on the proposals in this *Notice*.

44. This action is taken pursuant to Sections 4 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r), and Section 201(c) of the Communications Satellite Act of 1962, 47 4U.S.C. §721(c).

45. For further information on this *Notice* contact John M. Coles, Attorney, (202) 739-0731.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

### I. Ex Parte Rules - Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

### II. Initial Regulatory Flexibility Act

#### A. Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding proposed elimination of the Commission's Transborder Policy and removal of certain restrictions on separate international satellite systems with respect to domestic services in order to subject all U.S.-licensed fixed-satellites to the same regulatory treatment.

#### B. Objectives

The Commission seeks to subject all U.S.-licensed fixed-satellites to the same regulatory policy.

#### C. Legal Basis

The proposed action is authorized under Sections 4 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r), and Section 201 of the Communications Satellite Act of 1962, 47 U.S.C. § 721(c).

#### D. Reporting, Recordkeeping and Other Compliance Requirements

The proposed policy changes will not create additional burdens on the public.

[52] COMSAT, through its World Systems Division, already provides limited domestic service using Intelsat facilities between the U.S. mainland and off-shore U.S. points where the service is incidental to a primary international service. In addition, COMSAT, through its COMSAT General Corporation division, operates a limited number of domsats, which we propose to treat just like any other non-Intelsat, U.S.-licensed satellites.

**E. Federal Rules That Overlap, Duplicate or Conflict With These Rules**

None.

**F. Description, Potential Impact, and Number of Small Entities Involved**

The proposed policy changes discussed in this *Notice of Proposed Rulemaking* will enhance service options and price competition for any small businesses involved in the provision of international telecommunications services via U.S.-licensed satellites.

**G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives**

The *Notice* solicits comment on proposed policy changes necessary to achieve Commission objectives. Any significant alternatives may be set forth in comments to this *Notice*.

## III. Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules. 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before June 8, 1995 and reply comments on or before June 23, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center (Room 239) of the Federal Communications Commission. 1919 M St., N.W., Washington, D.C. 20554.

## APPENDIX B

### Proposed Rule Changes

Part 25 of Title 47 of the C.F.R. is proposed to be amended

**PART 25-SATELLITE COMMUNICATIONS**

1. The authority citation for Part 25 continues to read as follows:

**AUTHORITY: Secs. 25.101 to 25.601 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 419-427; 47 U.S.C. 701-744; 47 U.S.C. 554.**

2. Section 25.110 is amended by revising paragraph (b) to read as follows:

**§ 25.110 Filing of applications, fees, and number of copies.**

*****

(b) Applications for satellite radio station authorizations governed by this part and requiring a fee shall be mailed or hand delivered to the locations specified in Part 1, subpart G of this title. All other applications shall be submitted to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

*****

3. Section 25.113 is amended by revising paragraphs (b) and (d) to read as follows:

**§ 25.113 Construction permits.**

*****

(b) Construction permits are not required for satellite earth stations that operate with INTELSAT or INMARSAT space stations, or for earth stations that operate with U.S.-licensed space stations. Construction of such stations may commence prior to grant of a license at the applicant's own risk. Applicants must comply with the provision of 47 CFR 1.1312 relating to environmental processing prior to commencing construction. A simultaneous application for a construction permit and station license may be made for all earth station and space station facilities governed by this Part.

*****

(d) In addition to the construction permit required by paragraph (a) of this section, a launch authorization must be applied for and granted before a space station may be launched and operated in orbit. Request for launch and operation authorization and station license may be included in the application for space station construction permit. A launch authorization and station license may also be requested at any time for a space station constructed as an on-ground spare satellite. However, an application for authority to launch and operate an on-ground spare satellite will be considered to be a newly filed application for cut-off purposes, except where the space station to be launched is determined to be an emergency replacement for a previously authorized space station which has been lost as a result of a launch failure or a catastrophic in-orbit failure.

4. Section 25.114 is amended by revising paragraph (c)(18) and and removing and reserving paragraph (c)(24) to read as follows:

**§ 25.114 Applications for space station authorizations.**

*****

(c)***

(18) Detailed information demonstrating the financial qualifications of the applicant to construct and launch the proposed satellites. Applications shall provide the financial information required by § 25.140 (b) through (e).

*****

(24) [Reserved].

*****

5. Section 25.115 is amended by revising paragraph (c) to read as follows:

§ 25.115 Application for earth station authorizations.

***** (c) Large Networks of Small Antennas operating in the 12/14 GHz bands with U.S. satellites for domestic services. Applications to license small antenna network systems operating in the 12/14 GHz frequency band under blanket operating authority shall include the following:

*****

6. Section 25.117 is amended by revision paragraph (a) to read as follows:

**§ 25.117 Modification of station license.**

(a) Except as provided, no modification of a radio station governed by this part which affects the parameters or terms and conditions of the station authorization shall be made except upon application to and grant of such application by the Commission. No license modification will be required if the licensee seeks to access another U.S.-licensed fixed satellite provided:

(1) Consultations pursuant to Article XIV(d) of the INTELSAT Agreement have been completed for the satellites, services and countries involved; and

(2) The operators of the U.S.-licensed systems, where operated on a common carrier basis, have received specific authorization to provide the services to the proposed locations.

*****

7. Section 25.130 is amended by revising paragraph (d) to read as follows:

**§ 25.130 Filing requirements for transmitting earth stations.**

*****

(d) Transmission of signals or programming to non-U.S. satellites, or to foreign points by means of U.S.-licensed fixed satellites, may be subject to restrictions as a result of international agreements or treaties. The Commission will maintain public information on the status of any such agreements.

8. Section 25.131 is amended by revising paragraphs (b), (g) and (j) to read as follows:

**§ 25.131 Filing requirements for receive-only earth stations.**

*****

(b) Except as provided in paragraph (j) of this section, receive-only earth stations may be registered with the Commission in order to protect them from interference from terrestrial microwave stations in bands shared co-equally with the fixed service in accordance with the procedures of §§ 25.203 and §§ 25.251-25.256.

*****

(g) Reception of signals or programming from non-U.S. satellites may be subject to restrictions as a result of international agreements or treaties. The Commission will maintain public information on the status of any such agreements.

*****

(j) Receive-only earth stations operating with:

(1) INTELSAT space stations; or

(2) U.S.-licensed and non-U.S. space stations for reception of services from other countries;

Shall file an FCC Form 493 requesting a license for such station. Receive-only earth stations used to receive INTELNET I services from INTELSAT space stations need not file for licenses. *See* Deregulation of Receive-Only Satellite Earth Stations Operating with the INTELSAT Global Communications Satellite System, Declaratory Ruling, RM No. 4845, FCC 86-214 (released May 19, 1986).

9. Section 25.140 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 25.140 Qualifications of fixed-satellite space station licensees.**

(a) New fixed-satellites shall comply with the requirements established in Report and Order in CC Docket No. 81-704. The requirements for radio station applications for new fixed-satellites are specified in Appendix B to the Commission 1983 Processing Order (93 FCC2d 1260 (1983)). Applications must also meet the requirements in paragraphs (b) through (e) of this section. The Commission may require additional or different information in the case of any individual application. Applications will be unacceptable for filing and will be returned to the applicant if they do not meet the requirements referred to in this paragraph.

(b) Each applicant for a space station authorization in the fixed-satellite service must demonstrate, on the basis of the documentation contained in its application, that it is legally, financially, technically, and otherwise qualified to proceed expeditiously with the construction, launch and/or operation of each proposed space station facility immediately upon grant of the requested authorization. Each applicant must provide the following information:

*****

10. Section 25.202 is amended by revising paragraph (c) to read as follows:

**§ 25.202 Frequencies, frequency tolerance and emission limitations.**

*****

(c) Orbital locations assigned to space stations licensed under this part by the commission are subject to change by summary order of the commission on 30 days notice. An authorization to construct and/or to launch a space station becomes null and void if the construction is not begun or is not completed, or if the space station is not launched and positioned at its assigned orbital location and operations commenced in accordance with the station authorization, by the respective date(s) specified in the authorization. Frequencies and orbital location assignments are subject to the policies set forth in the Report and Order in IB Docket No. 95-41.

*****

11. Section 25.210 is amended by revising the introductory portion of paragraph (e), removing and reserving paragraph (f) and revising the introductory portion of paragraph (j) to read as follows:

**§ 25.210 Technical requirements for space stations in the Fixed-Satellite Service.**

*****

(e) For fixed-satellite space stations providing international service, full frequency re-use is defined as follows:

*****

(f) [Reserved].

*****

(j) All operators of space stations shall file a semi-annual report with the International Bureau and the Commission's Laurel, Maryland field office containing the following information:

*****

12. Section 25.211 is amended by revising paragraph (b) to read as follows:

**§ 25.211 Video Transmissions in the Domestic Fixed-Satellite Service.**

*****

(b) All 4/6 GHz analog video transmissions shall contain an energy dispersal signal at all times with a minimum peak-to-peak bandwidth set at whatever value is necessary to meet the power flux density limits specified in § 25.208(a) and successfully coordinated internationally and accepted by adjacent U.S. satellite operators based on the use of state of the art space and earth station facilities. Further, all transmissions operating in frequency bands described in §§ 25.208(b) and (c) shall also contain an energy dispersal signal at all times with a minimum peak-to-peak bandwidth set at whatever value is necessary to meet the power flux density limits specified in §§ 25.208(b) and (c) and successfully coordinated internationally and accepted by adjacent U.S. satellite operators based on the use of state of the art space and earth station facilities. The transmission of an unmodulated carrier at a power level sufficient to saturate a transponder is prohibited, except by the space station licensee to determine transponder performance characteristics. All 12/14 GHz video transmissions for TV/FM shall identify the particular carrier frequencies for necessary coordination with adjacent U.S. satellite systems and affected satellite systems of other administrations.

*****

13. Section 25.276 is amended by revising paragraph (c) to read as follows:

**§ 25.276 Points of communication.**

*****

(c) Transmission to or from foreign points over space stations in the Fixed-Satellite Service, other than those operated by the International Telecommunications Satellite Organization and Inmarsat, are subject to the policies set forth in the Report and Order in IB Docket No. 95-41.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| ORBITAL COMMUNICATIONS CORPORATION | File Nos. 22-DSS-MP-90 9-DSS-LA-94 10-DSS-AMEND-94 |

Authority to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile-Satellite Service System

**MEMORANDUM OPINION AND ORDER ON RECONSIDERATION**

**Adopted: March 30, 1995; Released: June 2, 1995**

By the Commission:

## I. INTRODUCTION

1. In October 1994, the Commission authorized Orbital Communications Corporation ("ORBCOMM") to construct, launch and operate a non-voice, non-geostationary ("NVNG") mobile-satellite system.[1] Final Analysis Communications Services, Inc. ("FACS") and Volunteers in Technical Assistance ("VITA") ask that we reconsider that decision.[2] For the reasons discussed below, we deny both Petitions for Reconsideration.

## II. BACKGROUND

2. ORBCOMM's system is the first NVNG mobile-satellite system to be licensed by the Commission. The other two applicants in the processing round are VITA and STARSYS Global Positioning, Inc.[3] Before we issued ORBCOMM's license, these three applicants reached a "Joint Sharing Agreement" stating that VITA would be able to use the 149.81 - 149.9 MHz frequency band for its Earth-to-space, or uplink, operations.[4]

3. In its Licensing Order, the Commission authorized ORBCOMM to operate in the uplink direction throughout the 148.905 - 149.9 MHz frequency band.[5] This band includes the 90 kHz that the first-round applicants agreed would be available for use by VITA. However, ORBCOMM's system contains a mechanism designed to prevent interference to other users of the band, including VITA and Federal Government users. The mechanism, a "Dynamic Channel Activity Assignment System" (DCAAS), is designed to avoid assigning ORBCOMM's subscriber traffic to uplink channels that are occupied by other users. To accomplish this, the DCAAS will scan ORBCOMM's uplink band approximately every five seconds searching for actively used channels. The system will then assign subscriber traffic to specific frequencies for the next five-second period based on its assessment of the least used frequencies at the time of the previous scan. We found the DCAAS would permit ORBCOMM to operate throughout the 148.905 - 149.9 MHz band without interfering with existing users.

4. In its original application, VITA proposed to use both fixed and mobile earth stations to access its space stations. It proposed to use "fixed" earth stations, intended for permanent installation, in the United States, and mobile "field" stations, described as lap-top, PC-based terminals, throughout the world.[6] VITA amended its system application in April 1994, however, to imply it may use field earth stations in the United States.[7] This created a potential for increased interference into Government operations in the band.[8] On December 13, 1994, the Interdepartment Radio Advisory Committee (IRAC)[9] notified the Commission that it had reached an accord with VITA that could allow VITA to use mobile earth terminals domestically, subject to certain specific operating limits.[10]

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[1] Orbital Communications Corporation, 9 F.C.C. Rcd. 6476 (1994). (Licensing Order).

[2] Petition for Reconsideration filed by Final Analysis Communication Systems, Inc. on November 23, 1994; Petition for Reconsideration filed by Volunteers in Technical Assistance on November 28, 1994. ORBCOMM opposed these Petitions on December 5, 1994 and FACS and VITA separately replied on December 15, 1994 and December 20, 1994, respectively.

[3] We expect to take action on these applications shortly.

[4] Jointly Filed Supplemental Comments of ORBCOMM, VITA and STARSYS, August 7, 1992 (Joint Sharing Agreement).

[5] ORBCOMM is authorized to operate throughout the entire 148 MHz-149.9 MHz band until STARSYS is prepared to launch its proposed system. In its application, ORBCOMM asked to use 50 kHz of spectrum between 400.075 and 400.125 MHz to provide GPS-derived time signals. Because the Licensing Order did not clearly state ORBCOMM's authority to operate on this frequency, we clarify now its right to do so.

[6] Application of Volunteers in Technical Assistance, File No. CSS-91-007(3), September 21, 1991. On page 126 of its application, VITA describes its intended use of approximately 1000 Field Earth Stations located in Africa, Asia and Latin America. None are described as intended for use in the United States.

[7] Amendment to the Application of Volunteers in Technical Assistance, File No. 30-DSS-AMEND-94, April 25, 1994.

[8] All NVNG applicants must demonstrate they have coordinated their fixed and mobile terminals with the Federal Government, which is the primary user of frequencies on which NVNG systems are to operate. *See* 47 C.F.R. § 25.142(b)(2)(ii). Because they may transmit from any location, mobile NVNG terminals must meet stringent operating limits devised to protect all other domestic operators in the 148 -149.9 MHz band. *See* 47 C.F.R. § 2.106 (n. US323). Fixed stations, on the other hand, can be individually coordinated according to their location. Consequently, fixed stations need not meet the mobile terminal operating limits.

[9] The IRAC, together with the National Telecommunications and Information Administration (NTIA), is responsible for frequency coordination efforts on behalf of Federal Government operations.

[10] Letter from Chairman, IRAC, to FCC Liaison Representative (Dec. 13, 1994). The IRAC has agreed that VITA's most

5. FACS and four other parties have filed applications in the second processing round of NVNG applications.[11] ORBCOMM also filed an application for license modification, requesting additional frequencies for its system. The comment cycle regarding second-round applications closed in April 1995.

## III. DISCUSSION

### A. *VITA's Petition*

6. In its Petition for Reconsideration, VITA states that ORBCOMM's system will harmfully interfere with VITA's field station uplink transmissions in the 149.81 -149.9 MHz band. Specifically, VITA argues that because its field stations will operate in a very short "burst" transmission mode, ORBCOMM's five-second band sweep will not adequately detect transmissions from these stations. If a VITA subscriber begins uplinking information immediately after the ORBCOMM satellite has detected no activity on the VITA frequency band, the ORBCOMM satellite could assign ORBCOMM traffic to VITA frequencies that would no longer be vacant. VITA alleges this could result in the "collision" of data packets between the two systems for up to five seconds. According to VITA, this will more harmfully impede its operations than those of ORBCOMM. To mitigate this potential interference, VITA asks us to condition ORBCOMM's license on successful frequency coordination with VITA.

7. ORBCOMM says that its DCAAS will operate with sufficient particularity to avoid undue collisions with VITA transmissions. It further states that the Commission, in licensing ORBCOMM to operate across VITA's frequencies, has already considered the impact of its operations on VITA's system proposal, and has found it to be unobjectionable. Finally, ORBCOMM notes that a license condition is unnecessary, because Section 25.142(b)(3) of our rules already requires NVNG licensees to coordinate their systems with each other.[12]

8. VITA replies that ORBCOMM's "paper" claims of protection are not convincing, that the Commission has not previously considered VITA's concerns, and that a separate license condition is necessary because ORBCOMM has not been responsive to VITA's requests for coordination.

9. As an initial matter, we clarify that the Commission did not address the concerns now raised by VITA when it granted ORBCOMM's license. While we did find that ORBCOMM's DCAAS system should adequately protect existing terrestrial services, we did not know the particulars of VITA's domestic earth-station operations because they were not finalized at that time.[13] Now that VITA has completed its system design,[14] and the IRAC has approved VITA's proposed use of field terminals, the Commission, ORBCOMM and others will have the opportunity to assess the interference potential both to and from VITA's field station operations.

10. At the time the parties reached the Joint Sharing Agreement, they agreed that ORBCOMM's DCAAS could adequately protect VITA's operations.[15] However, as discussed above, VITA's original proposal included only fixed earth-stations, as opposed to both fixed and field-earth stations, in the United States. The fixed earth-station transmissions, like those of existing terrestrial users, are likely to be of considerably longer duration than those of mobile NVNG users, and thus more readily identified by the DCAAS scan as unavailable for assignment to other traffic. Thus, our finding that ORBCOMM's DCAAS system would protect existing terrestrial users would have extended to VITA's initial fixed earth-station proposal. The addition of field earth-stations to its system design will complicate this sharing scenario. The shorter, field transmissions now proposed by VITA may be harder to detect and avoid. Accordingly, we agree with VITA that ORBCOMM's DCAAS may not avert all potential collisions among the data packet uplinks of the two systems. Because VITA's operations are confined to 90 kHz of spectrum, it has a limited number of available channels to which to reassign any blocked transmissions. ORBCOMM has a much greater range of available spectrum than does VITA, and is thus more likely to be able to reassign its colliding traffic to a clear channel. Any collisions that do occur are therefore likely to impact VITA's operations more severely than those of ORBCOMM. As the two systems become operational, the parties will likely need to coordinate their operations to permit an acceptable level of service for each.

11. We agree with ORBCOMM, however, that a specific license condition requiring coordination with VITA is unnecessary. Indeed, in our Report and Order establishing technical and service rules for the NVNG mobile-satellite service, we rejected a request that NVNG licenses bear a condition requiring the licensee to negotiate coordination agreements in good faith with subsequent licensees.[16] Both the Commission's rules and longstanding policy make it abundantly apparent that we expect our licensees in this service, as in any other, to coordinate in good faith to resolve conflicts.[17] There is no indication here that the parties have even commenced negotiations, much less reached an impasse. We are confident that the parties will

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recent system proposal will not harmfully interfere into government operations as long as six specific license conditions are placed on VITA's uplink operations.

[11] LEO ONE USA Corporation, GE American Communications, Inc., E-Sat, Inc., and CTA Commercial Systems, Inc. LEO ONE filed its application in July 1994. The remaining parties filed applications pursuant to a Commission-imposed filing deadline on November 16, 1994.

[12] ORBCOMM also says that the company has not been contacted by VITA regarding this matter, but agrees to discuss it with VITA upon request.

[13] Specifically, it would have been premature to address concerns regarding VITA's proposed field station operations until it was apparent that they could be coordinated with IRAC for domestic use. It was not clear at the time ORBCOMM's license was issued that this coordination would be successful.

[14] Supplement to Application for Authority to Construct, April 25, 1994, In Response to Frequency Coordination Between VITA and NTIA, forwarded to the Commission by VITA on December 16, 1994.

[15] *See* Joint Sharing Agreement at p. 4.

[16] Report and Order in CC Docket 92-76, 8 F.C.C. Rcd. 8450, at ¶ ¶ 8-9 (1993).

[17] *E.g., id.* at ¶ 9; 47 C.F.R. § 25.142(b)(3) (NVNG licensees and applicants must "cooperate fully and make every reasonable effort to resolve technical problems and conflicts that may inhibit effective and efficient use of the radio spectrum").

be able to resolve any conflicts that may arise.[18] Should VITA and ORBCOMM reach an impasse incoordination efforts, however, the Commission will impose its own solution.

**B.** ***The FACS Petition***

12. On November 16, 1994, pursuant to a cut-off deadline, FACS and other prospective new entrants filed NVNG applications. On that same date, ORBCOMM filed an application for license modification, requesting additional frequencies for its first-round system. FACS asks that we add a condition to ORBCOMM's license stating that ORBCOMM may not seek to expand its system until after second-round applications for new systems have been processed. FACS argues that allowing ORBCOMM to seek expansion spectrum will run counter to the Commission's expressed intent to promote new NVNG systems.

13. ORBCOMM replies that FACS's Petition is procedurally and substantively defective. ORBCOMM states it would be premature to prohibit it from seeking expansion capacity until we determine how much spectrum is needed to accommodate the new entrants and how much spectrum will be available.[19] ORBCOMM notes further that only one of the first-round applications has been granted. If either of the remaining two is not granted, it argues, additional spectrum will be available to the later filed applications. ORBCOMM also notes additional NVNG spectrum may be allocated at the upcoming World Radiocommunication Conference.[20] ORBCOMM finally alleges that the Commission may not summarily deny it access to NVNG spectrum without either a comparative hearing or some opportunity for general notice and comment.

14. In response, FACS alleges further that ORBCOMM's Application for License Modification is, in substance, a timely-filed Petition for Reconsideration of its license.[21] Thus, FACS argues, the Commission must vacate ORBCOMM's license[22] and treat the original application and the modification request together as a newly filed, second-round application. ORBCOMM replies that it neither explicitly nor implicitly declined its system license.[23] ORBCOMM states that the modification application filed on November 16 represents proposed system enhancements, not a counter-proposal to build a different system. Grant of this modification request is not critical, ORBCOMM states, to the company's commencement of service. Finally, ORBCOMM notes that the timing of its filing was driven solely by the Commission's initiation of a second NVNG processing round, not by the thirty-day time period in which it could reject its authorization.

15. We find FACS's claim that ORBCOMM has declined its license untenable. ORBCOMM says that it did not decline its license. If it had wanted to, it could have done so clearly. It did not. Section 25.156 of our rules, 47 C.F.R. § 25.156, describes the manner in which a license must be declined. A licensee wishing to decline a conditional license must file a petition for reconsideration within thirty days of the release date of the grant. That petition must reject the grant as made and explain the reasons why the application should be granted as originally requested. ORBCOMM's November 16 pleading meets only one of these criteria - - the thirty day time limit. This application does not reject the license, nor does it request that the Commission reconsider any action that it has taken. Indeed, ORBCOMM's modification application does not take issue with any condition placed on its license. Rather, ORBCOMM's license modification request seeks the use of new frequencies and additional satellites to expand its authorized system. It looks precisely like the pleading it is styled to be - - an application for license modification. The fact that the cut-off deadline for consideration of new frequencies fell within the thirty days after the grant of ORBCOMM's license has no bearing on whether the company has accepted its original authorization. Absent a clear statement in its modification application, or elsewhere, that ORBCOMM has affirmatively declined the authorization, we will not vacate its license.

16. FACS nonetheless urges us to look to the "substance" of ORBCOMM's action and conclude that ORBCOMM unintentionally declined its license.[24] The facts do not support this conclusion either. In support of this argument, FACS attempts to draw an analogy between a situation in which the Commission protected its procedural rules from

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[18] VITA has already suggested ways to address its concerns regarding data packet collisions in its uplink band. There are perhaps others. As a starting point, the parties should look to their Joint Sharing Agreement in determining their respective obligations. As we stated in the ORBCOMM Licensing Order, the parties and the Commission have all placed great weight on this Agreement.

[19] While the initial comment cycle regarding these applications recently ended, the Commission has not yet had time to fully analyze these comments.

[20] Agenda Item 3(d) for the International Telecommunication Union's 1995 World Radiocommunication Conference (WRC-95) establishes the possibility of the allocation of spectrum to this service in 1995.

[21] Paragraph 42 of the Licensing Order states that ORBCOMM may decline its authorization within thirty days of release of the Licensing Order. Failure to decline within that period constitutes formal acceptance of the authorization. This clause, which is routinely included in the licenses of our domestic space station licensees, is the embodiment of Section 25.156 of our rules, 47 C.F.R. § 25.156.

[22] Section 1.110 of our rules states that upon receipt of a written request rejecting a conditional grant, the Commission will vacate its original action on the application, and set the application for hearing. 47 C.F.R. § 1.110.

[23] Because this issue was raised for the first time in FACS's Reply comments, we will grant ORBCOMM's request that we accept for consideration its opposition to this allegation, entitled "Supplemental Response to the Reply of Final Analysis," dated January 3, 1995. On January 18, 1995, FACS filed a Reply to ORBCOMM's Supplemental Response. This Reply was not limited in scope to matters raised in ORBCOMM's prior pleading. *See* 47 C.F.R. § 1.45(b). However, we will accept for consideration only that portion of FACS's Reply that responds to ORBCOMM's Supplemental Response.

[24] Alternatively, FACS appears to suggest that ORBCOMM's modification request is, in substance, a major amendment that will require the Commission to treat ORBCOMM's first round little LEO application as a newly filed application that must be considered in the second processing round. *See* 47 C.F.R. § 25.116(c). However, this cannot be the case. ORBCOMM did not have a pending application at the time it filed its modification request. Rather, it became a Commission licensee on October 27, 1994 - - the date its Licensing Order was released. *See* 47 C.F.R. § 1.103(a). Because ORBCOMM was no longer a space station applicant on November 16, it could not have filed an amendment. *See* 47 C.F.R. § 25.116(a).

abuse by refusing to allow a party to circumvent statutory time limits merely by renaming its pleading (Application of RCA Global Communications, Inc., 68 F.C.C. 2d 1197 (1978)) and the situation at hand, where the Commission is asked to infer that a licensee has inadvertently, but in accord with Commission rules, acted to its own detriment. The rationale for looking to the substance of the transaction at issue is readily apparent in the former case. Parties are obligated to meet our rules, and may not circumvent them by mere semantics. Here, the Commission is asked to find that a party has unintentionally, and to its own detriment, *met* our rules. Unlike the situation in RCA Global Communications, the Commission in this situation has no interest to protect by such a draconian action.

17. We also agree with ORBCOMM it is too early to determine whether ORBCOMM should be permitted to seek system expansion. If all the pending NVNG applications, including those requesting expansion capacity, can be granted, the relief sought by FACS will be unnecessary. If the pending applications are mutually exclusive, the Commission will have to determine the proper method for selecting among the competing qualified applicants. In the course of that proceeding, which will involve the opportunity for notice and comment by interested parties, it would be appropriate to consider legitimate matters of policy such as those raised by FACS. Because FACS will have ample opportunity to advance its arguments regarding access to NVNG spectrum,[25] we deny FACS's Petition.

## IV. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by Volunteers in Technical Assistance and by Final Analysis Communications Services, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[25] Because we find that consideration of FACS's Petition is premature, we will not address in detail here ORBCOMM's allegations that the summary denial of its modification request without either comparative hearing or notice and comment rulemaking would be unlawful. However, consideration of this issue in a subsequent proceeding that will allow for full comment by affected parties should obviate ORBCOMM's concern.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CS Docket No. 95-61**

In the Matter of

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming

**NOTICE OF INQUIRY**

**Adopted: May 4, 1995; Released: May 24, 1995**

By the Commission:

**Comment Date: June 30, 1995**
**Reply Comment Date: July 28, 1995**

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## I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] Section 19(g) of the 1992 Cable Act directs the Commission to report annually to Congress on the status of competition in the market for the delivery of video programming.[2] The Commission issued its first report in compliance with this statutory requirement on September 28, 1994.[3] This *Notice of Inquiry* (*"NOI"*) is designed to assist the Commission in gathering the information necessary to prepare the second of these annual reports on competition in the market for the delivery of video programming.

2. The 1992 Cable Act clearly indicates Congress' preference for competition, rather than regulation.[4] However, in 1992, Congress found that sufficient competition to cable television systems did not exist in most local markets, and as a result cable operators had "undue market power . . . as compared to that of consumers and video programmers."[5] Accordingly, Congress established a regulatory scheme to promote competition and to ensure that consumer interests are protected in the absence of effective competition to cable.[6] Thus, the 1992 Cable Act provides that where effective competition is present, cable television rates shall not be subject to regulation by government but shall be regulated by the market.[7] Alternatively, where effective competition is absent, the Commission is to protect the interest of subscribers by ensuring that basic cable rates are reasonable and cable programming service rates are not unreasonable.[8]

3. Congress also sought to foster the development of competition to cable operators by requiring, in the "program access" provisions, that programming be made available to all multichannel video programming distributors on fair terms and conditions.[9] In addition, the 1992 Cable Act

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. § 521, *et seq.*

[2] Communications Act of 1934, as amended ("Communications Act") § 628(g), 47 U.S.C. § 548(g).

[3] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report*, CS Docket No. 94-48, 9 FCC Rcd 7442 (1994) (*"1994 Competition Report"* or *"1994 Report"*).

[4] Communications Act § 623(a)(2), 47 U.S.C. § 543(a)(2).

[5] 1992 Cable Act, sec. 2, 106 Stat. at 1460.

[6] *Id.*

[7] Communications Act § 623(a), 47 U.S.C. § 543(a).

[8] Communications Act §§ 623 (b)-(c), 47 U.S.C. §§ 543 (b)-(c).

[9] 1992 Cable Act, § 19, Communications Act § 628, 47 U.S.C. § 548. Congress also passed the "program carriage" provision, 1992 Cable Act, §12, Communications Act § 616, 47 U.S.C. § 536, and the "channel occupancy" provision, 1992 Cable Act, § 11, Communications Act § 613(f)(1)(B), 47 U.S.C. § 533(f)(1)(B). The latter two provisions help ensure that vertically integrated cable operators do not, through anticompetitive means, limit the ability of unaffiliated video programming vendors to secure carriage

provides that a cable operator shall have a uniform rate structure throughout the area served by its cable system,[10] and that a franchise authority may not grant an exclusive franchise or unreasonably refuse to award an additional competitive franchise.[11] A critical element of the regulatory framework mandated by Congress is to promote the emergence of competition over time by fostering the entry of alternative multichannel video programming distributors.

4. The Commission has also sought in a variety of proceedings to promote the growth of competition in the marketplace for the delivery of video programming. This *NOI* presents an opportunity to assess whether progress is being made in developing competition and to determine whether further actions are necessary.

## II. SUMMARY OF THIS NOTICE OF INQUIRY

5. This *NOI* is intended to solicit information, data and public comment that will be used to prepare the Commission's second annual report, the 1995 Competition Report. The purpose of this report is to monitor and summarize the status of competition in the marketplace for video programming. We intend to gather sufficient information to prepare an analysis of the current status of competition for the delivery of video programming and to evaluate changes in the competitive environment since the *1994 Competition Report* was submitted to Congress last September.

6. Accordingly, commenters are invited to submit data, information and analysis regarding the cable industry, existing and potential competitors to cable systems, and the prospects for increased competition in the market for the distribution of video programming. We ask specific questions to solicit current information and data regarding changes since the *1994 Competition Report* and fact-based projections for the future development of competition in this market. Parties also are asked to provide any other information or analysis deemed relevant for this report.

7. The Commission recognizes that much of the information that we will need for the 1995 Competition Report can be obtained from publicly available sources. In addition, a considerable amount of relevant, and even necessary information, has been provided in filings with the Commission in connection with a variety of ongoing proceedings. The Commission also recognizes that parties that choose to file comments in response to this *NOI* have limited resources. Accordingly, we are not asking parties to provide the Commission with information that is otherwise publicly available. Nor are we asking parties to repeat here the substance of comments that have been filed in other proceedings. Nonetheless, while the Commission intends to look to publicly available sources and filings in other proceedings as sources of information, commenters should feel free to comment or provide information on any matter that they believe is relevant to the issues on which the Commission will report.

8. As stated in the *1994 Competition Report*, we view this annual statutory requirement as a "work in progress in which certain parts are continually updated and revised" because the market for the delivery of video programming is "dynamic and evolving."[12] We begin, in Section III of this *NOI*, with an overview of the *1994 Competition Report*, including its findings regarding the status of competition as of September 1994 and a summary of the framework for analyzing competition in the market for delivered video programming.[13] Section IV seeks information and comment regarding the relevant product and geographic markets for delivered video programming. We wish to examine distributors already in the market, entities that are potential entrants in this market and other technologies that might impact the nature of competition. The *1994 Competition Report* analyzed the cable television industry and compiled statistics regarding the development of existing and potential competition for the provision of video programming by alternative delivery technologies. In this *NOI*, we seek data to update this information to assess the current state of such competition and to analyze evolving trends. In Section V, we ask for comment on the structure of the market for the delivery of video programming and the effect of market structure on competition. In Section VI, we seek recommendations, as appropriate, for promoting further competition in the market for delivered video programming.

9. In addition, throughout this *NOI* we ask that commenters consider the economic framework for analyzing competition in the market for the provision of video programming. Parties are invited to comment on the findings of the *1994 Competition Report* regarding the relevant product and geographic markets, our evaluation of the market structure and our conclusions concerning the cable industry's market power. We also invite comment on the relevant economic methodologies for assessing the extent of competition and market performance in the market for the delivery of video programming. Finally, in addition to comments on specific issues raised in this *NOI*, we seek any information that commenters believe will assist the Commission in the preparation of this report.

## III. OVERVIEW OF THE *1994 COMPETITION REPORT*

10. The *1994 Competition Report*'s analytical framework can be summarized as follows: (a) definition of the market; (b) analysis of the status of current and potential future participants in the market; (c) examination of the conduct of the firms in the market; (d) analysis of market structure conditions that may affect competition, with particular em-

on multichannel distribution systems. In addition, we have held that under the program carriage provision, injured multichannel video program distributors have standing to complain of exclusive programming arrangements that are the result of cable operator coercion. *See Implementation of the 1992 Cable Act -- Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order*, MM Docket No. 92-265, 9 FCC Rcd 4415 (1994).

[10] Communications Act § 623(d), 47 U.S.C. § 543(d).

[11] Communications Act § 621(a)(1), 47 U.S.C. § 541(a)(1).

[12] *1994 Competition Report*, 9 FCC Rcd at 7558, ¶ 253.

[13] In the market for "delivered video programming," cable operators or alternative distributors supply programming to viewers. By contrast, in the "programming market," producers supply their programming to cable operators or to alternative distributors.

phasis on impediments to competition and regulatory efforts to promote competition; and (e) evaluation of the overall economic performance of the market.

11. Specifically, the Commission wrote that the relevant market consists of a relevant product and a relevant geographic area. In the *1994 Competition Report*, the Commission used the 1992 Cable Act's definition of "multichannel video programming service"[14] as a starting point for the definition of the relevant product.[15] The Commission also analyzed the status of other multichannel video programming distributors ("MVPDs") that were not included in the statutory definition,[16] and "discuss[ed] other video programming distribution media as potential substitutes for cable services."[17] The Commission defined the relevant geographic market as the "area to which buyers will reasonably turn and from which competing suppliers sell their products," and wrote that "[g]iven the current state of competitive entry, it would seem reasonable to define, at least tentatively, the local franchise area as the geographic market relevant to an analysis of the cable industry."[18]

12. The Commission observed that cable television was the only provider of multichannel video programming for most households.[19] The Commission found that cable television was available to over 96% of all homes and almost 60% of all households subscribed to basic cable service in 1993.[20] We observed that since 1990, when the Commission last provided Congress with an analysis of the cable industry and the state of competition,[21] the cable industry had grown with respect to subscriber penetration, average system channel capacity, the number of programming services available, revenues, expenditures on programming, and capital investment.[22]

13. In addition, the *1994 Competition Report* analyzed the status of existing and potential competitors to local cable systems.[23] The Commission stated that while competitors were emerging, alternative video programming distributors were not available to a sufficient number of subscribers to create a competitive environment in most video programming delivery markets. We reported the existence of approximately fifty "overbuilds" scattered across the country where more than one cable system has cable lines passing the same homes in direct competition for subscribers.[24]

14. With respect to alternative distribution technologies, the Commission observed that some inroads had been made since the *1990 Cable Report* on the status of competition in the cable industry. Direct broadcast satellite ("DBS") service, which the Commission first authorized in 1982, became available to consumers in 1994.[25] Another four million households received multichannel video programming using home satellite dishes ("HSDs").[26] The Commission found that multipoint multichannel distribution service ("MMDS"), or "wireless" cable systems, were increasing in number and obtaining the financial resources necessary for growth and expansion. The Commission indicated that, in June 1994, there were 143 systems serving 550,000 subscribers.[27] Satellite master antenna television ("SMATV") systems, also known as "private cable systems," showed growth in terms of numbers of systems and subscribers. Industry sources indicated that there were between 3,000 and 4,000 such systems serving about one million subscribers in August 1994.[28] In addition, at the time the *1994 Competition Report* was issued, the Commission had begun to authorize local telephone companies to provide video dialtone ("VDT") service within their local telephone service areas. Five technical or market trials and one permanent VDT service were authorized and another twenty-three applications were pending which, if granted, would allow service to 8.5 million homes.[29] The *1994 Competition Report* also considered electric utilities as potential distributors of video programming.[30]

15. The *1994 Competition Report* also evaluated broadcast television and other technologies as competitors to multichannel video program distributors.[31] We observed that, for the more than one-third of all households that do not subscribe to cable, broadcast television satisfies the demand for video programming. We also noted that even in the households that subscribe to cable, two-thirds of prime time viewing was of retransmitted broadcast stations. Despite the size of its audience, the Commission found that broadcast television does not constrain cable rates to reasonable levels. However, the Commission identified possible technological and regulatory advances that might allow broadcast television, low-power television and local multipoint distribution service ("LMDS") to become distributors of multichannel video programming.[32]

16. Turning to market structure conditions, the Commission analyzed multiple system operator ("MSO") ownership of cable systems and programming services, including changes since the *1990 Report*. We concluded that there had been a moderate increase in the horizontal concentration of cable MSOs nationwide and, if consummated, several proposed mergers would result in a further increase in concentration and increased "clustering," or regional concentration, of cable system ownership.[33] Vertical integration in the industry (i.e., the ownership of programming services by MSOs) was approximately the same in 1994 as in 1990, with cable MSOs continuing to invest in video programming vendors. Since 1990, there had been growth in diversity and quality of programming services that were offered or whose launch was announced.[34] The

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14 *See* Communications Act § 602(12), 47 U.S.C. § 522(12).
15 *1994 Competition Report*, 9 FCC Rcd at 7467, ¶ 49.
16 *See* Communications Act § 602(12), 47 U.S.C. § 522(12).
17 *1994 Competition Report*, 9 FCC Rcd at 7467, ¶ 50.
18 *Id.* at 7468, ¶ 51.
19 Broadcast television is not an MVPD under the definition in the 1992 Cable Act. *See* Communications Act § 602(12), 47 U.S.C. § 522(12).
20 *1994 Competition Report*, 9 FCC Rcd at 7451, ¶ ¶ 18-19.
21 *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report*, MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) ("*1990 Report*" or "*1990 Cable Report*").
22 *1994 Competition Report*, 9 FCC Rcd at 7451-61, ¶ ¶ 17-36.
23 We describe each of these competitors more fully below.
24 *1994 Competition Report*, 9 FCC Rcd at 7468-72, ¶ ¶ 55-60.
25 *Id.* at 7473-78, ¶ ¶ 62-70.
26 *Id.* at 7478-82, ¶ ¶ 171-177.
27 *Id.* at 7482-88, ¶ ¶ 78-90.
28 *Id.* at 7488-92, ¶ ¶ 91-96.
29 *Id.* at 7495-505, ¶ ¶ 103-20.
30 *Id.* at 7508-09, ¶ ¶ 131-33.
31 *Id.* at 7492-95, ¶ ¶ 97-102.
32 *Id.* at 7505-08, ¶ ¶ 121-130.
33 *Id.* at 7511-20, ¶ ¶ 137-56.
34 *Id.* at 7520-36, ¶ ¶ 157-93.

Commission stated that it appeared the program access rules adopted as a result of the 1992 Cable Act had been successful in ensuring the availability of programming to competing multichannel video program distributors.

17. Finally, the Commission evaluated overall economic performance in local markets for the distribution of multichannel video programming services. We found that competitive rivalry in most such markets "is largely, often totally, insufficient to constrain the market power of incumbent cable systems."[35] However, we also wrote that "entry of competitors to local cable systems over the coming months and years should exert a significant, favorable effect on market conduct and performance . . . ."[36]

## IV. DEFINING THE MARKET FOR DELIVERED VIDEO PROGRAMMING

### A. The Market for Delivered Video Programming

18. The Commission intends to draw upon the relevant market concept to define the market for analysis in the 1995 Competition Report. As in the *1994 Competition Report*, the Commission intends to define the relevant product market by analyzing the degree to which products or services are "reasonably interchangeable by consumers for the same purposes."[37] The relevant geographic market is defined in a similar manner. The relevant geographic market is the area in which products compete with substantial parity. As with the definition of the relevant product market, its scope is defined by the geographic area to which buyers can reasonably turn or from which competing suppliers are likely to sell.[38]

19. In the *1994 Competition Report*, the Commission used the 1992 Cable Act's definition of "multichannel video programming service" as a starting point for the definition of the relevant product.[39] The Commission also analyzed the status of other MVPDs that were not included in the statutory definition, and "discuss[ed] other video programming distribution media as potential substitutes for cable services."[40] We invite comments about that definition of the relevant product market, and in particular, responses to the following questions:

(a) What changes (if any) have occurred, since the *1994 Competition Report*, in the relevant product market relative to the delivery of video programming?

(b) Was the Commission's analysis of the relevant product market in the *1994 Competition Report* correct? Or, was it too broad? Or, was it too narrow?

(c) In the *1990 Cable Report*, the Commission noted that cable provided fourservices: (1) an "antenna service" delivering high quality retransmitted broadcast signals; (2) a "premium" service (offering uninterrupted recent movies; (3) a "general interest basic" service consisting of imported distant broadcast channels; and (4) a "specialized basic" service with channels that offer either news, sports or entertainment.[41] Should the Commission's analysis treat cable service as a single product or as a combination of these or other services comprising separate relevant products?

(d) What technologies are being used to provide services that should be included in the definition of the relevant product market? What technologies might be added to that list within the next two years?

(e) Can subscribers create their own service comparable to cable by combining over-the-air broadcast service with service from a non-cable MVPD and "premium" programming obtained from a non-cable MVPD or personal VCR?

(f) What approach should the Commission use to identify alternative video services that compete with cable services? Should the Commission attempt to assess how many cable subscribers would switch to alternative video service providers in response to a "small but significant non-transitory price increase"[42] for a particular cable service? If the effect of such a price increase were to be assessed, should the current regulated cable rate be used as the base price for computing the price increase?

20. With regard to the relevant geographic market, the Commission wrote that "[g]iven the current state of competitive entry, it would seem reasonable to define, at least tentatively, the local franchise area as the geographic market relevant to an analysis of the cable industry, but that over time this definition may be broadened."[43] We invite comments about that analysis and definition of the relevant geographic market and, in particular, responses to the following questions:

(a) What is the relevant geographic area within which customers can turn for alternative sources of delivered multichannel video programming? Are franchise areas relevant geographic areas? Or are they too broad? Or too narrow?

(b) As cable operators increasingly cluster their operations, are the relevant geographic areas going to become increasingly regional? On the other hand, will relevant areas remain local, and perhaps smaller than franchise areas, if it is likely that substantial numbers of potential subscribers in any given area will not be able to choose from the same range of service providers as other potential subscribers in the same area (e.g., because they do not live in multiple dwelling units ("MDUs") or do not have line-of-sight access to satellites)

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35 *Id.* at 7556, ¶ 246.
36 *Id.*
37 *1994 Competition Report*, 9 FCC Rcd at 7463, ¶ 40 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956)).
38 *Id.* (citing *Tampa Elec. Co. v. Nashville Coal Co.* (*"Tampa Electric"*) , 365 U.S. 320, 330-33 (1961).
39 *1994 Competition Report*, 9 FCC Rcd at 7468, ¶ 49.
40 *Id.* at 7468, ¶ 50.
41 *1990 Cable Report*, 5 FCC Rcd at 4995-6, ¶ ¶ 50-52.
42 *See* Department of Justice and Federal Trade Commission, *1992 Horizontal Merger Guidelines* ¶ 1.51, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573-5 to 20,573-6.
43 *1994 Competition Report*, 9 FCC Rcd at 7468, ¶ 51.

(c) How should the relevant geographic areas be defined in light of entry by firms that operate regionally (VDT) and nationally (DBS)?

**B. Status of the Cable Industry and Its Competitors**

*1. Cable Industry*

21. In order to evaluate fully the effect of existing and potential competitors in markets for multichannel video programming, we first seek information concerning cable industry performance. We intend to update and expand on the information that was provided in the *1994 Competition Report*, including that presented in Appendix C.[44] Among the issues that we intend to explore are the following: (a) the numbers of homes passed, including the numbers of subscribers, and penetration rates; (b) channel capacities, including the numbers and types of channels offered; (c) industry revenues, including the sources of those revenues; (d) cable industry expenditures and cash flows; (e) the industry's capital investments; and (f) cable system mergers and acquisitions, including the prices paid for systems. We note that the *1994 Competition Report*'s analysis of these issues was based largely on public information, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider. In addition to the foregoing, we seek comment on the following.

22. *Cable Industry Output.* (a) The percentage of cable households that subscribe to satellite programming services and the changes in such percentage since last year; (b) the percentage of total subscribers that receive cable service from cable systems that offer "lifeline basic service," defined as a limited, low price package that includes only broadcast stations and public, educational and governmental ("PEG") channels and the changes in this percentage since last year; and (c) the percentage of subscribers receiving satellite programming on the basic tier and the number of such channels.

23. *Atributes of Cable Services.* The extent of customer satisfaction with cable services, including quantity and quality of programming, and other quality attributes of cable services such as service response times.

24. *Cable Industry Advertising and Nonsubscription Revenue.* The amount of industry revenue obtained from local advertising spots made available to cable operators by programming networks; the amount of national and regional advertising sold by programming networks; recent developments and trends concerning cable industry participation in advertising markets; and other potential sources of revenue.

25. *Cable Industry Capital Investment.* (a) Cable operators' access to loans from banks and other lenders, to equity capital from investors and recent developments in those markets; (b) the extent to which cable systems are upgrading their facilities by deploying conventional cable technology (e.g., bigger headends) versus advanced technologies such as fiber optics and signal compression; (c) the extent to which cable systems have deployed fiber optic plant, the combinations of fiber and coaxial cable that are proving to be the most efficient, the amount of fiber that was deployed over the past year and the percentage of that deployment that was replacement of existing coaxial wiring; (d) the extent to which cable systems and programmers have begun to deploy the facilities needed to take advantage of enhanced services that can be provided using digital compression, the current status of the manufacture and deployment of digital converters and the current status of, and activities associated with, the National Digital Television Center launched by Tele-Communications Inc. ("TCI").[45]

26. *Cable Industry Responses to Competition.* The steps cable operators are taking to build subscribership in anticipation of the entry of competitive alternatives. In particular, cable industry responses to actual or potential competition in local markets, including, in particular, any pricing responses, changes in advertising and service quality, and changes in tiering or packaging of services.

*2. Cable Overbuilds*

27. The term "overbuild" describes the situation in which a second cable operator enters a local market in direct competition with an incumbent cable operator. In these markets, the second operator, or "overbuilder" lays wires in the same area as the incumbent, "overbuilding" the incumbent's plant.[46] The *1994 Competition Report* cited studies suggesting that overbuilding to date has been relatively limited.[47] The Commission noted that "[f]actors such as local franchising requirements, entry-deterring strategic behavior by the incumbent operator, and the prospective effects of possible direct competition by local telephone companies, appear to be some of the considerations that currently limit the extent of overbuilding."[48]

28. The Commission intends to analyze in the 1995 Competition Report the status of competition from cable overbuilds and the reasons for that level of competition. Among other things, we will be looking at the following issues: (a) the number of cable operators facing competition from cable overbuilds, the locations of those overbuilds, and changes in those figures over the past year; (b) the manner in which those overbuilders market their services to subscribers, and the numbers of subscribers choosing to subscribe to the services of the incumbent and the overbuilder, respectively; (c) the percentage of the franchise area served by the overbuilder and the percentage of the area served by the incumbent cable system that is also served by the overbuilder; (d) the effects of overbuild competition on cable rates, services and service quality; and (e) the nature and extent of current barriers to overbuild competition, such as the overbuilder's need to incur substantial sunk costs combined with the incumbent cable operator's ability to prevent recovery of those costs by lowering price, instituting litigation and bringing regulatory

[44] *1994 Competition Report*, 9 FCC Rcd at 7451-61, ¶ ¶ 17-36; 9 FCC Rcd at 7566-74, App. C.
[45] *Id.* at 7555-56, ¶ 244.
[46] *Id.* at 7468, ¶ 54.
[47] *Id.* at 7468-72, ¶ ¶ 55-60.
[48] *Id.* at 7472, ¶ 60 n.136.

challenges. We invite any party with specific information on overbuild competition to comment on these issues and any other matters that they feel are relevant to the issue of overbuild competition.

29. We also note that Section 621(a) of the Communications Act prohibits the unreasonable denial of a competitive franchise.[49] However, a split has developed in the federal circuit courts of appeal over the interpretation of the 1992 Cable Act's prohibition on exclusive franchises.[50] The Commission stated in the *1994 Competition Report* that it would recommend the revision of that section to clarify that it applies prospectively to all denials of franchises including those that would compete with existing franchises.[51] In connection with these developments, we invite comments concerning the following questions:

(a) To what extent do cable systems have exclusive franchises?

(b) How many, if any, applications for competitive franchises have been filed since the enactment of the 1992 Cable Act? How many competitive franchises have been awarded? How many have been denied? Has Section 621(a) promoted the award of competitive franchises?

(c) To what extent have the activities of local franchising authorities been an impediment to overbuilding by additional cable systems? Have incumbent cable operators used local franchising processes to delay or prevent overbuilding?

### *3. Wireless Cable Systems*

#### *a. Multichannel Multipoint Distribution Service*

30. The term "wireless cable" is often used to refer to multichannel multipoint distribution service ("MMDS") and multipoint distribution service ("MDS"), both of which use over-the-air microwave facilities to transmit video programming. The programming is transmitted from wireless cable towers to subscribers using rooftop antennas.[52] There are eleven MMDS channels available to wireless cable system operators for full-time use, and either one or two single-channel MDS channels depending on the particular city. In addition, wireless cable system operators have access to the twenty channels allocated to instructional television fixed service ("ITFS")[53] on a leased, part-time basis. Thus, wireless cable operators have access to a maximum of thirty-two or thirty-three channels, using traditional analog transmission technologies. Since release of the *1994 Competition Report*, the Commission has taken actions designed to eliminate the backlog of MMDS license applications and to streamline the licensing process. On November 10, 1994, the Commission denied petitions for reconsideration of the return of over 4,000 applications to construct and operate MDS transmitter sites.[54] On that date, the Commission also initiated a 6rulemaking proceeding looking towards streamlining the processing of MMDS applications, including electronic filing and the use of competitive bidding procedures.[55] On February 7, 1995, the Commission adopted changes in the application process for ITFS licenses designed to make it more efficient and flow more smoothly.[56]

31. We intend to update the information concerning the current status of competition from MMDS system operators that was presented in the *1994 Competition Report*.[57] Among the issues that we intend to explore are: (a) the number of wireless cable systems and subscribers, including the number of new systems that have begun operations and the number of systems that have ceased operations; (b) the average number of subscribers served by established systems, the penetration as a percentage of the number of homes seen, and the penetration as a percentage of homes passed by cable; (c) the marketing strategies and methods of competition employed by wireless cable operators (in terms of both price and product differentiation); (d) plans for development of new wireless cable systems; (e) the projected growth of the industry in terms of subscribers and revenue; and (f) the current status of consolidation in the wireless cable industry, including numbers of systems changing hands, the sales prices for those systems, and the relative share of MMDS subscribers served by the largest wireless MSOs. We note that the *1994 Competition Report*'s analysis of these issues was based largely on public information, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider.

32. We also request information on the following questions:

(a) Have MMDS systems achieved success by emphasizing price competition (offering comparable services, or the most desired services, at substantially lower rates), or has it proven to be a more successful

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[49] Communications Act § 621(a), 47 U.S.C. § 541(a).

[50] *Compare Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178 (11th Cir. 1993) (applies prospectively to all denials of franchises including those that would compete with existing franchises) *with James Cable Partners v. City of Jamestown*, 43 F.3d 277 (6th Cir. 1995) (all existing exclusive franchises shall remain in force, and only new grants of exclusives are prohibited).

[51] *1994 Competition Report*, 9 FCC Rcd at 7558, ¶ 251.

[52] *Id.* at 7482, ¶ 78.

[53] ITFS channels are used by educational institutions to interconnect scattered campus locations.

[54] *In the Matter of 101 Applications for Authority to Construct and Operate Multipoint Distribution Stations, Memorandum Opinion and Order on Reconsideration*, 9 FCC Rcd 7886 (1994); *In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites, Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 1335 (1994), *joint notice of appeal filed, A/B Financial, Inc., et al. v FCC*, Docket No. 95-1027 (D.C. Cir. Jan. 9 , 1995).

[55] *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(g) of the Communications Act (Competitive Bidding), Notice of Proposed Rulemaking*, MM Docket No. 94-131, 9 FCC Rcd 7665 (1994).

[56] *Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, Memorandum Opinion and Order*, MM Docket No. 93-24 (FCC 95-51 Feb. 7, 1995).

[57] *1994 Competition Report*, 9 FCC Rcd at 7482-88, ¶ ¶ 78-90.

strategy to emphasize product differentiation (offering services that are not available from principal competitors, or offering higher quality services)?

(b) How are MMDS system operators planning to deploy digital compression technology?[58] To what extent will the use of digital compression technology enable them to offer a range and quality of programming options that is comparable to, or better than, the range of services offered by competing cable system operators?

(c) What are the costs associated with the deployment of digital compression technology? Will MMDS system operators be able to employ digital compression technology at low enough costs to remain competitive with incumbent cable operators?

(d) Is there a trend towards increasing concentration of MMDS system ownership?[59] If so, what are the competitive implications of this trend? Is it likely to lead to increased competition with cable systems?

(e) We note that Bell Atlantic, NYNEX and Pacific Telesis have recently announced plans to invest in wireless cable systems.[60] We seek comment on the strategic issues underlying these investments, and whether commenters view these investments as part of a trend towards increased local telephone company ("LEC") investment in wireless cable facilities. Are such interests likely to lead to increased competition with cable systems? Are there competitive questions raised by these investments?

(f) What impediments are there to the development of wireless cable, and how have they changed since the *1994 Competition Report*?

(g) Have MMDS operators been the targets of significant instances of alleged anticompetitive conduct since the issuance of the *1994 Competition Report*?[61]

***b. Local Multipoint Distribution Service***

33. Local multipoint distribution service ("LMDS") is a technology, similar to MMDS, in which multiple channels of video programming are transmitted using high-frequency microwave channels in the 28 GHz band. LMDS subscribers must have an antenna that is located with a line of sight to the transmitter. LMDS requires multiple transmitters in "cells" with radii of three to six miles in order to cover the same area that could be covered by a single MMDS transmitter.[62]

34. In the *1994 Competition Report*, the Commission identified one LMDS system authorized by the Commission and in commercial operation.[63] As was the case then, we cannot now reach any conclusions on the feasibility of LMDS as a technology that could be used to offer competitive service in the video marketplace because the Commission has before it an open proceeding concerning the authorization of services for use of the 28 GHz band.[64] We also recognize that considerable information concerning the competitive potential of this technology has been provided to the Commission in comments filed in that proceeding. We do not ask parties to repeat here the substance of comments that have been filed in other proceedings, except to the extent they wish to bring particular matters to our attention.

***4. Satellite Master Antenna Systems***

35. SMATV systems (also known as "private cable systems") are MVPDs that serve residential, multiple dwelling units, and various other buildings and complexes.[65] A SMATV system offers generally the same type of programming as a cable system, and the operation of a SMATV system largely resembles that of a cable system – a satellite dish receives the programming signals, equipment processes the signals, and wires distribute the programming to individual dwelling units. The primary difference between the two is that a SMATV system typically is an unfranchised, stand-alone system that serves a single building or complex, or a small number of buildings or complexes in relatively close proximity to each other. This is because a SMATV system is different from a cable system only in that it does not use "closed transmission paths" to: (1) serve buildings that are not commonly owned, controlled, or managed; or (2) cross a public right-of-way.[66]

36. We intend to update the information concerning the current status of competition between cable and SMATV system operators that was presented in the *1994 Competi-*

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[58] The Wireless Cable Digital Alliance has commenced the testing of digital technology to be used in wireless systems. The Alliance has shown that the use of a digital signal combined with compression algorithms has the potential to increase the channel capacity of wireless systems from the current maximum of 33 channels to at least 200 and perhaps even as many as 300. *See* Comm. Daily, Mar. 7, 1995, at 2. At least one MMDS operator, Cross-Country Wireless, which has indicated that it would be purchased by Pacific Telesis, announced its intention to use digital compression to offer more than 100 channels by the end of 1996. *See* Comm. Daily, Apr. 18, 1995, at 8. *See also* Rich Brown, *MMDS (Wireless Cable): A Capital Idea*, Broadcasting & Cable, May 1, 1995, at 16.

[59] For example, we note that it has been reported that during 1994 and early 1995, American Telecommunications Inc. became the first wireless company to have over 100,000 subscribers by purchasing over 40,000 subscribers from existing systems. Paul Kagan Associates, Inc., *Wireless Cable Investor News Analysis*, Dec. 9, 1994, at 1.

[60] *See* Kent Gibbons, *Wireless Op Receives $100M from Baby Bells*, Multichannel News, Apr. 3, 1995, at 58; Gautam Naik, *PacTel to Buy Tiny Wireless Cable Firm for $120 Million to Speed Video Project*, The Wall St. J., Apr. 18, 1995, at A4.

[61] *1994 Competition Report*, 9 FCC Rcd at 7487, ¶ 89.

[62] *Id.* at 7505, ¶ 121.

[63] The LMDS system identified in the *1994 Competition Report* is CellularVision of New York, operating in Brooklyn, New York. *Id.* at 7505-6, ¶ 122.

[64] *Rulemaking to Amend Parts 2 and 21 of the Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Services*, MM Docket No. 92-297, 8 FCC Rcd 557 (1993).

[65] In the *1994 Competition Report*, the Commission wrote that there appeared to be approximately 3000 to 4000 SMATV systems operating nationwide (9 FCC Rcd at 7488-89, ¶ 92). As of August 15, 1994, approximately one million subscribers were served by SMATV systems.

[66] *Implementation of Sections 11 and 13 of the 1992 Cable Act (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions), Memorandum Opinion and Order on Reconsideration of the First Report and Order*, MM Docket No. 92-264 (FCC 95-21 Jan. 12, 1995) (*"SMATV-Cable Cross-Ownership Recon."*).

*tion Report*.[67] The issues that we expect to explore include: (a) the current and projected future numbers of SMATV systems and subscribers, and their locations; and (b) the channel capacities of SMATV systems, and the existing and projected future developments in channel capacities. We note that the *1994 Competition Report* 's analysis of these issues was based largely on public information, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider.

37. We also request comments concerning the following questions:

(a) To what extent is competition from SMATV systems characterized by competition for the exclusive right to serve all subscribers in an individual multiple dwelling unit, and to what extent by competition for individual subscribers within a multiple dwelling unit (where each subscriber may choose between two (or more) service providers)? What are the relative shares of multiple dwelling units served by the cable and SMATV industries?

(b) What effects, if any, have state mandatory access laws had on the economic viability of SMATV systems?

(c) To what extent is the SMATV industry becoming more concentrated? To what extent is the industry changing from one of small proprietor owned or developer owned systems, to one characterized by multiple system operators that serve entire metropolitan areas or regions? What are the sources of new investment in the industry? Are wireless cable system operators purchasing SMATV systems, and vice versa? Are any other MVPDs purchasing SMATV systems in significant numbers?

(d) Are SMATV system operators engaging in marketing strategies designed to differentiate their services from cable services (particularly bundling with home security and intercom systems), and to what extent has price competition been a successful growth strategy for SMATV operators?

(e) Are there SMATV and other non-cable operators that specialize in serving hotels and motels? How does their share of this business compare to the cable industry's share? What are the types of services that are offered by these operators to hotels and motels?

(f) To what extent are SMATV operators using 18 GHz technology to interconnect SMATV systems?[68] Have such developments facilitated increased competition from SMATV operators? Is the use of 18 GHz links leading to the creation of systems that serve wider geographic areas?

(g) Has the loosening of the SMATV-cable cross-ownership restriction had any effect on SMATV operators?[69] In particular, is there likely to be a significant exodus of SMATV operators from the market or acquisition of SMATV operators by incumbent cable operators? Or will the eased exit policy induce the increased entry of SMATV systems?

(h) What is the competitive effect of the Communications Act definition of a cable system, which includes any system that interconnects separately owned buildings even where there is no use of public rights-of-way?[70] Should that definition be modified, as recommended by the Commission in the *1994 Competition Report?*

(i) Are there other barriers to increased competition by SMATV systems? In particular, what effect do perpetual exclusive contracts (or ones of greater than 15 to 20 years in duration) between building owners and cable system operators have on competition by SMATV system operators? To what extent do SMATV systems typically enter into exclusive contracts? What is the typical duration of these contracts? What should public policy be regarding these contracts?

38. Finally, the Commission also has before it a proceeding concerning home wiring issues in which SMATV operators have extensively participated.[71] We recognize that considerable information has been provided to the Commission in comments filed in that proceeding concerning the potential competitive effect of various potential outcomes. We do not ask parties to repeat the substance of comments that have been filed in that proceeding, except to the extent that they wish to bring to our attention particular matters that are relevant to the 1995 Competition Report.

### *5. Direct-to-Home ("DTH") Satellite Services*

#### *a. Direct Broadcast Satellite Services*

39. The *1994 Competition Report* examined two types of direct-to-home ("DTH") satellite services that offer video programming for subscription that is comparable to that provided by cable. One is Direct Broadcast Satellite ("DBS") services which transmit signals in the K-band "intended for reception by the general public."[72] Hughes Communications Galaxy, Inc./DirecTV ("DirecTV") and United States Satellite Broadcasting ("USSB") offer high powered DBS service. Primestar Partners, L.P. ("Primestar"), a medium power K-band service, is also analyzed as a DBS service, although it operates in the

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[67] *1994 Competition Report*, 9 FCC Rcd at 7488-92, ¶ ¶ 91-96.

[68] *See Amendment of Part 94 of the Commission's Rules to Permit Private Video Entertainment Distribution Systems Access to the 18 GHz Band, Report and Order*, PR Docket No. 90-5, 6 FCC Rcd 1270 (1991).

[69] The Commission recently released an order on reconsideration concerning, among other things, cable operators' acquisition of SMATV systems. In that decision, we eliminated the prior prohibition on such purchases. The Commission noted that one benefit of the decision was to provide an exit strategy for SMATV operators. The absence of this exit strategy caused by the prior prohibition was claimed to have been a barrier to entry. *SMATV-Cable Cross-Ownership Recon.*

[70] Communications Act § 602(7), 47 U.S.C. § 522(7).

[71] *Implementation of the 1992 Cable Act (Home Wiring), Report and Order*, MM Docket No. 92-260, 7 FCC Rcd 7349 (1993), *recon. pending*.

[72] 47 C.F.R. § 100.3.

Fixed Satellite Service ("FSS").[73] Using a relatively small dish, DBS subscribers receive programming that is comparable to cable programming. There are now over one million subscribers for the three DBS services combined.[74] EchoStar Satellite Corporation and AlphaStar, a venture of Tee-Comm Electronics, Inc., expect to begin DBS service in 1995.[75]

40. We intend to update the information concerning the current status of competition from DBS systems that was presented in the *1994 Competition Report*[76] and request comments concerning the following questions:

(a) To what extent do the subscribership of these DBS services overlap? What is the total estimated subscriber base for each individual service provider and for the industry as a whole?

(b) What is the projected subscribership of each DBS service and of the industry as a whole at the end of 1995? At the end of each subsequent year through the end of 1999? On what are these projections based?

(c) Where are most DBS subscribers located (i.e., urban versus rural areas)? How many subscribers are located in areas served by cable operators? What factors account for cable subscribers' choice to receive DBS services? What percentage of DBS subscribers also subscribe to cable services, and what cable services do they receive?

(d) What is the total estimated channel capacity of each operator? What are the plans of each operator to increase the digital compression ratio from the initial ratio used at the time of launch (so as to offer more channels at a later date)?

(e) How does each operator market its services? Are current marketing efforts targeted equally to potential subscribers in areas served by cable systems and potential subscribers in areas unserved by cable systems?

(f) Has the inability to offer local broadcast channels affected the competitive impact of DBS service? Have there been any developments that would permit DBS dish owners to use their systems to receive local broadcast channels?

(g) Are the prices for DBS services nationally uniform, or do they vary depending on the location of the subscriber? If they vary, what are the reasons for the price differentials?

(h) What is the availability of equipment for those who wish to subscribe to this service? If there is an equipment shortage, when is it projected to be eliminated? What is the basis for this projection?

(i) How are equipment prices projected to change over one year? Over three years? What is the basis for this projection? Do installation and equipment charges limit the extent to which DBS services serve as reasonable substitutes for cable services?

(j) What developments have there been concerning licensing and distribution arrangements for DBS equipment (such as plans for Sony to begin production and for other manufacturers to be licensed)?[77]

41. We would like to update the information reported on existing permittees that were identified in the *1994 Competition Report*.[78] What are the projected launch dates for these systems and their anticipated service offerings? What type of arrangements have been made for licensing and distribution of the equipment and systems for services that are not yet launched? Is it anticipated that these services will use the same or different receiving equipment as DirecTV and USSB?

42. In addition to the issues addressed in the questions set forth above, the Commission observes that local zoning and other regulations may potentially serve as an impediment to the development and expansion of DBS service.[79] In that regard, we note that the Commission recently adopted a *Notice of Proposed Rulemaking* concerning the issue.[80] We seek comment on these issues.

***b. Home Satellite Dishes***

43. Home satellite dishes ("HSDs") are seven to ten feet in diameter and receive video programming transmitted in the C-band of frequencies. HSD owners can watch approximately 150 unscrambled signals without payment and over 100 scrambled channels purchased from program packagers. Comments cited in the *1994 Competition Report* indicated that there were approximately four million HSD users, roughly half of whom subscribe to one or more programming services.

44. We intend to update the information concerning the current status of competition from HSD systems that was presented in the *1994 Competition Report*.[81] Among the issues that we intend to explore are: (a) the current and projected future numbers of HSD systems and subscribers, and their locations; (b) the channel capacities of HSD systems and the numbers of channels of programming offered in program packages; (c) prices for HSD systems and program packages; and (d) the extent to which HSD owners subscribe to cable services and the reasons given for such subscriptions. We note that the *1994 Competition Report*'s analysis of these issues was based largely on public information, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on

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[73] *1994 Competition Report*, 9 FCC Rcd at 7473, ¶ 61.

[74] DBS Digest, Mar. 5, 1995, at 1.

[75] *See* Nikhil Hutheesing, *Kamikaze Satellites?* Forbes, Jul. 4, 1994, at 126. *See also* AlphaStar Television Network, *Tee-Comm Launches AlphaStar, America's New High-Powered Digital DTH Service*, Mar. 14, 1995 (News Release).

[76] *1994 Competition Report*, 9 FCC Rcd at 7474-79, ¶ ¶ 62-70.

[77] *Space Business Update*, Aerospace Daily, Mar. 22, 1995 (three additional suppliers of DBS equipment have been licensed -- Hughes Network Systems, Toshiba American Consumer Products and Uniden America Corp.

[78] *1994 Competition Report*, 9 FCC Rcd at 7476, ¶67.

[79] *See* 47 C.F.R. § 25.104.

[80] *Preemption of Local Zoning Regulation of Satellite Earth Stations, Notice of Proposed Rulemaking*, IB Docket 95-59 (FCC 95-180, Apr. 27, 1995) ("*Zoning Notice*").

[81] *1994 Competition Report*, 9 FCC Rcd at 7478-82, ¶ ¶ 71-77.

any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider.

45. We also request comments concerning the following questions:

(a) How are HSD services marketed to subscribers? What is the projected growth of HSD use in the next year? Three years? What is the basis for this projection?

(b) Has the inability to offer local broadcast channels affected the competitive impact of HSD services? Have there been any developments that would permit HSD owners to use their systems to receive local broadcast channels?

(c) The HSD industry reportedly had a record year in 1994 in terms of systems sold and subscriptions to packaged programming services.[82] To what can that success be attributed?

(d) Sales of new HSD systems and new subscriptions to HSD package programming services grew at substantially slower rates in the last few months of 1994.[83] To what can that decline be attributed? Is that decline related to the rollout and marketing of DBS?

46. In addition to the issues addressed in the questions set forth above, the Commission recognizes that local zoning and other regulations may potentially serve as impediments to the development and expansion of HSD services.[84] We seek comment on these issues concerning zoning[85] and other local regulations that affect competition from HSD services.

*6. Local Exchange Carriers/Video Dialtone Services*

47. The Communications Act and Commission rules generally prohibit local telephone companies ("LECs") from providing video programming directly to subscribers within their service areas.[86] They are, however, permitted to provide video programming outside their service areas and in rural areas.[87] In addition, the court ordered agreement under which AT&T divested its local exchange telephone service (the "Modification of Final Judgment" or "MFJ") restricts the ability of the Bell Operating Companies ("BOCs") to transmit communications between or beyond the local calling areas of their regions.[88] Over the past few years, LECs have, however, been obtaining greater freedom to participate in the multichannel video marketplace.

48. In 1992, the Commission established a video dialtone ("VDT") framework which allows LECs, consistent with the Communications Act, to make available on a nondiscriminatory common carrier basis, a platform capable of transmitting video programming supplied by an unaffiliated entity.[89] Since that time, the Commission has authorized technical and market trials as well as permanent VDT service.[90] In addition, in 1993, the U.S. District Court for the Eastern District of Virginia held the cross-ownership prohibition unconstitutional as applied to Bell Atlantic in its service areas; in 1994 US West obtained a similar ruling in the U.S. District Court for the Western District of Washington.[91] Since the Commission issued the *1994 Competition Report*, several other courts have struck down the cross-ownership prohibition.[92]

49. In light of these decisions, the Cable Services Bureau, Common Carrier Bureau and the Office of the General Counsel announced that they will no longer enforce the cross-ownership restriction against: (1) any telephone companies that are parties to cases in which the Commission is enjoined from enforcing Section 613(b), including NYNEX, Ameritech, BellSouth, Bell Atlantic, US WEST, GTE, and most members of the United States Telephone Association, Organization for the Protection and Advancement of Small Telephone Companies and National Telephone Cooperative Association; and (2) any other telephone companies, to the extent they operate in the Fourth and Ninth Circuits, regardless of their status as parties to any suit.[93]

50. The Commission has several ongoing proceedings regarding video dialtone services. The Commission issued a *Fourth Further Notice of Proposed Rulemaking* to consider changes in its video dialtone rules in light of court decisions such as those described above, and to consider the extent to which Title II and Title VI of the Communications Act apply to telephone companies providing video programming directly to subscribers in their telephone service areas over video dialtone facilities.[94] The Commission also issued a *Third Further Notice of Proposed Rulemaking*

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[82] Media Business Corp., *DTH Nears $2.5 Billion Retail*, Sky Report, Feb. 1995, at 5-9.

[83] *Id.*

[84] *See* 47 C.F.R. § 25.104.

[85] *See Zoning Notice*, IB Docket 95-59.

[86] Communications Act § 613(b), 47 U.S.C. § 533(b). *See also* 47 C.F.R. §§ 63.54, 63.58. The cross-ownership restriction was instituted by the Commission in 1970, following a series of proceedings in which the Commission found that telephone companies denied access or provided discriminatory access to cable systems to utility poles necessary for cable distribution. Certain aspects of the regulatory restriction were codified by Congress in the 1984 Cable Act. Communications Act § 613(b), 47 U.S.C. § 533(b) (1984).

[87] 47 C.F.R. §§ 63.08, 63.09, 63.88.

[88] *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[89] *Telephone Co.-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking*, CC Docket No. 87-266, 7 FCC Rcd 5781 (1992).

[90] *1994 Competition Report*, 9 FCC Rcd at 7499-500, ¶ ¶ 109-11. As of May 4, 1995, the Commission had granted twelve permanent and ten trial VDT authorizations and eleven applications were pending. In addition, two applications filed by Bell Atlantic were suspended at its request.

[91] *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994) (Section 533(b) held unconstitutional as applied to Bell Atlantic within its service areas); *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wa. June 15, 1994), *aff'd*, 48 F.3d 1092 (9th Cir. 1995) (Section 533(b) held unconstitutional as applied to US West within its service areas).

[92] *See, e.g., Ameritech Corp. v. U.S.*, 867 F. Supp. 721 (N.D. Ill. Oct. 28, 1994); *NYNEX Corp. v. U.S.*, No. 93-323-P-C (D. Me. Dec. 8, 1994).

[93] *Public Notice*, DA 95-520, Mar. 17, 1995, *corrected*, DA 95-722, Apr. 3, 1995.

[94] *Telephone Co.-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking*, CC Docket No. 87-266, (FCC 95-20 Jan. 20, 1995).

which sought information and comment on a number of issues including (1) channel capacity issues, (2) criteria for evaluating the viability of additional wire-based video competition in particular markets in the context of a proposal to use these criteria to modify the Commission's ban on the acquisition by telephone companies of cable facilities in their telephone service areas for use in the provision of video dialtone, (3) whether the Commission should require or permit LECs to provide preferential access or discounted rates to commercial broadcasters and/or certain types of not-for-profit programmers; and (4) whether we should adopt additional rules with respect to pole attachments and conduit rights.[95] The Commission is also processing a series of Section 214 applications for video dialtone facilities and services.[96]

51. We intend to update the information concerning the current status of the deployment of VDT technology that was presented in the *1994 Competition Report*.[97] Among the issues that we intend to explore are: (a) the current projections for competition from VDT networks that are the subject of pending applications for Section 214 authorization; and (b) the results obtained in various market trials for which reports have been filed with the Commission (including information on channel capacity and digital versus analog, system architecture, pricing, penetration rates, subscriber interface equipment, programmer customers). We note that the *1994 Competition Report* 's analysis of these issues was based largely on public information and filings with the Commission, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider.

52. We also recognize that considerable information has been provided to the Commission in filings in the VDT proceedings described above concerning various issues relevant to the 1995 Competition Report. While we do not ask parties to repeat their comments that have been filed in other proceedings, we request any supplemental information parties choose to submit on these issues.

53. In addition to the foregoing, the Commission seeks comments concerning the following questions:

(a) How will the prices and services offered over VDT networks compare to the prices and services charged by cable operators? How will this comparison change over time? What is the basis for this prediction?

(b) What are the technological impediments and advantages to the deployment of VDT platforms as competitive alternatives to cable systems?

(c) What is the status of the build-out of systems for which Section 214 authorizations have been granted?

(d) Have the plans for deployment of VDT networks for which Section 214 authorizations have been granted, or the plans for deployment of VDT networks that are the subject of applications currently pending before the Commission, been affected by events since the *1994 Competition Report?*

(e) What are the current plans for deployment of VDT systems that are not currently the subject of applications before the Commission?

(f) Are there particular market characteristics, such as relatively high population density, that are necessary to support competition between VDT and cable systems? Will this limit competition to certain types of geographic areas, such as large metropolitan areas?

54. We also note that in January 1995, Rochester Telephone and its Vancouver, Canada based partner USA Video Corporation reportedly ended their video-on-demand trial due to lack of customer demand for the services.[98] Commenters are asked to discuss any implications of this development.

55. Finally, we note that in October 1994, Bell Atlantic, NYNEX, and Pacific Telesis Group announced the formation of a joint venture in the area of interactive video networks. One part of the venture reportedly will produce content for the networks and the other will develop technical systems. Another company, named Interactive Digital Solutions, was formed by Silicon Graphics and AT&T in October 1994 to develop network infrastructure and related services.[99] Finally, Ameritech, BellSouth and SBC Communications announced a definitive agreement with Disney Corporation to develop and package video programming and interactive services.[100] We seek comment on the competitive implications of these developments.

### *7. Broadcast Television Service*

56. In the *1994 Competition Report*, we stated that broadcast television stations continue to be significant distributors of video programming. We indicated that broadcast television is an important source of entertainment, news, public affairs and sports programming. Between 1984 and 1994, the number of broadcast stations, commercial and noncommercial, grew from 1149 to 1518, and a fourth national network, Fox, emerged. In addition, in recent months, two new networks -- United Paramount and Warner -- have started program distribution. Broadcast stations, whether received over-the-air or through the facilities of an MVPD, still attract a large portion of the viewing audience. For example, as noted in the *1994 Competition Report*, two-thirds of all cable television viewers watching television in the 1992 to 1993 season were viewing a retransmitted broadcast signal. In addition, approximately one-third of all television households choose not to sub-

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[95] *Telephone Co.-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, CC Docket No. 87-266, 10 FCC Rcd 244 (1994).

[96] *See* Communications Act § 214, 47 U.S.C. § 214.

[97] *1994 Competition Report*, 9 FCC Rcd at 7495-505, ¶ ¶ 103-20.

[98] Richard Karpinski, *No Demand for Video-on-Demand - Rochester Quits its Trial*, Interactive Age, Jan.30, 1995, at 5.

[99] Heather Clancy, *Telcos Step Up Integration Activities -- Baby Bells Team Up on Information Superhighway Effort, Computer Reseller News*, Nov. 7, 1994, at 283.

[100] *Three RHCs Join Disney in $500-Million Project to Develop Video Service*, Comm. Daily, Apr. 19, 1995, at 1-2.

scribe to cable service. Over-the-air television seems to satisfy their demand for video programming. Nevertheless, we concluded, in the *1994 Competition Report*, that broadcast stations alone cannot currently provide the full range of specialized services offered by cable and other MVPDs.[101]

57. The Commission intends to explore in the 1995 Competition Report the implications of the developments mentioned in the preceding paragraph for competition from broadcast television and requests comments concerning the following questions:

> (a) Has the role of broadcast networks changed with the entry of new networks (United Paramount and Warner) in the last year? What is the effect of the fact that at least one of these networks (Warner) is relying on cable carriage of a superstation to provide access to households in areas where they have been unable to enter into affiliation agreements with local broadcast stations?[102]
>
> (b) To what extent is any constraining effect of broadcast networks on the conduct of cable systems affected by the fact that they provide programming that is an important component of the services offered by cable systems? How is any constraining effect limited by the fact that a substantial percentage of broadcast network audiences are viewing the programming through distribution over cable systems?
>
> (c) What is the competitive effect of broadcast television in conjunction with multichannel distribution services such as DBS, which is prohibited from offering network-affiliated broadcast television stations except in limited areas,[103] on the program delivery market?

58. In addition to the issues addressed in the questions set forth above, advances in broadcast technology, such as digital compression and advanced television, could (a) permit multiple programs to be broadcast over a single channel, and (b) expand greatly the overall number of broadcast video signals available in a particular geographic market.[104] We ask for comment on the extent to which such changes would strengthen over-the-air broadcast as a competitor to cable.

59. In addition to full-power broadcast television stations, the Commission licenses low-power television ("LPTV"). These stations, assigned to the same VHF and UHF broadcast spectrum as full-power stations, operate at lower power, reach more limited geographic areas and are afforded secondary status to full-power stations.[105] Under existing Commission rules, an entity could use LPTV stations to offer multichannel video programming service that could be a competitor, especially to premium channels or packages of such channels.[106] The Commission's rules permit LPTV stations to offer "subscription television," whereby the broadcaster charges a fee for the provision of one or more scrambled channels and the equipment to decode the signal.[107] Furthermore, the rules permit an LPTV operator to own more than one such station in a market, unlike the restriction of one station to a market for full-power stations.[108] Thus, multiple LPTV stations in a market could be combined to provide multichannel video service. On the other hand, the allocation of spectrum for LPTV use has been frozen in the largest markets inp the United States.[109] In light of these developments, the Commission invites comment concerning the extent to which LPTV technology might be deployed to provide a competitive alternative to cable services if the spectrum is made available for this purpose.

#### *8. Other Distribution Technologies*

60. The Commission intends to explore in the 1995 Competition Report the effect of the widespread ownership and use of video cassette recorders ("VCRs") on competition in the market for video programming. Although VCRs are not multichannel video programming distributors, the Commission has previously observed that the widespread use of VCRs to view over-the-air television programs at times other than when they are broadcast and to view pre-recorded programming provides competition, at least in part, to traditional cable service offerings.[110] A Commission staff study determined that VCRs are best considered a competitor to the premium and pay-per-view services provided by cable operators because both offer commercial-free movies.[111] We invite comment concerning the extent to which the widespread ownership and use of VCR technology might constrain cable system operators' conduct in markets for the distribution of video programming.

61. We also want to examine in the 1995 Competition Report whether the deployment of interactive video and data service (IVDS) will affect competition in the MVPD market. Among the issues regarding IVDS that the Commission may explore in the 1995 Competition Report are: (a) the identities of the licensees, and the locations in which they are authorized to provide service; (b) the types of services that licensees currently envision offering, and the schedule for deploying those services: and (c) the extent to which these services could be substitutes or complements for services offered by cable system operators, and what those services are. Accordingly, we invite comments on the proposed issues, method of developing information,

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[101] *1994 Competition Report*, 9 FCC Rcd at 7492-95, ¶ ¶ 97-102.

[102] Warner indicates that 18% of its coverage will come from cable carriage of superstation WGN. David Tobenkin, *New Players Get Ready to Roll*, Broadcasting & Cable, Jan. 2 , 1995, at 30-31.

[103] 17 U.S.C. § 119, Satellite Home Viewer Act of 1988, Pub. L. 100-667, 102 Stat. 3949 (1988), extended by the Satellite Home Viewer Act of 1994, Pub. L. 103-369, 108 Stat. 3477 (1994).

[104] *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 7 FCC Rcd 6924 (1992).

[105] *See* 47 C.F.R. Part 74.

[106] *1994 Competition Report*, 9 FCC Rcd at 7507-08, ¶ ¶ 126-30.

[107] 47 C.F.R. § 73.642(a)(2).

[108] 47 C.F.R. § 74.732(b).

[109] *See Public Notice, Notice of Limited Low Power Television/Television Translator Filing Window from April 11, 1994 Through April 15, 1995*, released Mar. 3, 1994.

[110] *1990 Report*, 5 FCC Rcd at 5019-5020, ¶ ¶ 109-110.

[111] *See* Florence Setzer & Jonathan Levy, *Broadcast Television in a Multichannel Marketplace* 108 (Federal Communications Commission, Office of Plans and Policy, OPP Working Paper 26, June 1991).

or any additional information that the Commission should consider. We recognize that information may have been provided to the Commission in filings in IVDS proceedings which may be relevant to the 1995 Competition Report. We do not ask parties to repeat here the substance of comments that have been filed in that proceeding except to the extent that they wish to bring particular matters to our attention.

*9. Other Distributors*

62. The Commission intends to explore in the 1995 Competition Report the possible entry of other types of firms into the market for the delivery of multichannel video programming, such as electric utilities.[112] The *1994 Competition Report* stated that some municipal electric utility companies are actively engaged in or contemplating overbuilding.[113] The Commission also learned that plans to use electric power lines to provide multichannel video services are not well-developed. Nonetheless, the possibility of entry by electric utilities cannot be ignored due to the fact that those companies have already incurred substantial costs to deploy a network that reaches nearly every household in the country.

63. A number of electric companies are considering the development of broadband networks that are capable of distributing video programming and telephone services.[114] One reason for this activity has been the need for two-way communications capabilities in order to implement energy management solutions. A number of power companies have also formed alliances with cable companies or telephone companies,[115] which could limit the competitive threat posed by the video transmission potential of these networks. Nonetheless, there remains significant interest in developing this potential "third line" into homes. In connection with these developments, we invite comments concerning the following questions:

(a)What is the likelihood that a significant number of power companies might enter the market for the delivery of video services? Which are the existing, emerging or potential providers of video programming service among these companies?

(b) Is it more likely that power companies might choose to serve as "pipeline" companies, and offer the use of their facilities to other video programming providers?

(c) What are the joint ventures, existing or planned, between cable or other communications companies (e.g., LECs, long distance telephone companies) and utilities to implement energy management programs or to provide video services. Should the Commission be concerned about those ventures because they may result in the elimination of a potential source of entry into the market for the delivery of multichannel video programming? To what extent do these joint ventures yield increased efficiency due to economies of scale and scope or for other reasons?

*10. Technological Advances*

64. There are technological changes and developments that may directly affect the competitive structure of the market for the delivery of video programming. As we observed in the *1994 Competition Report*, these issues may have a significant effect on how competition develops and the manner in which consumers have access to the services these technologies may provide.[116]

65. One significant technological development that may have profound effects on the future of competition in markets for the delivery of video programming is the development of digital compression technology. Digital compression is a technology that reduces the amount of information needed to transmit digitally recorded video, audio and text. This reduction in size or "compression" of digital information can increase the capacity of MVPDs' distribution systems by as much as eight times. It seems likely that such technology will be gradually integrated into information distribution systems, paralleling the transition from analog programming to digitally formatted programming and the introduction of high definition television ("HDTV"). The more quickly programmers and distributors transition to a digital format the sooner they will realize the benefits of compression technology.

66. A number of barriers stand in the way of the transition to digital compression. The first barrier is the determination of a standard digital encoding scheme. Without a standard scheme it is conceivable that not all digital programming would be compatible with all distribution systems. A number of different coding schemes have been developed, but the front runner seems to be MPEG-2, developed under the guidance of the Motion Picture "Experts Group.[117] General Instrument, a leading supplier of set-top boxes, is including an MPEG-2 option on its soon to be shipped DigiCipher digital set-top boxes. Other equipment suppliers, including Hewlett Packard and Scientific Atlanta, are similarly proceeding in the development of their own boxes.

67. Another potential barrier to the implementation of digital conversion is the cost of set-top boxes. If MPEG-2 does in fact become the industry standard, consumers must be provided hardware and software needed to process digital signals. Right now, the most basic of digital set-top boxes costs in the range of $600.[118] Some observers believe that MSOs will not begin to invest substantially in digital boxes until prices fall beneath $400.[119]

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[112] We define electric utilities to include investor-owned utilities, municipal utility systems, and exempt public utility holding companies. 15 U.S.C. § 79c.

[113] *See 1994 Competition Report*, 9 FCC Rcd at 7508-09, ¶ ¶ 131-33.

[114] *See, e.g.*, Clark Gellings and Karl Stahlkoph, *Positioning Strategies: Utility Information Superhighway* 5-11 (1994) (presentation prepared for Electric Power Research Institute); *Power Companies Outline Plans, Current Projects at Conference on Utility Telecom Involvement*, Telco Competition Report, Feb. 28, 1995; Vincente Pasdeloup, *Utilities Buzz About Telecoms*, Cable World, Feb. 20, 1995, at 86; Harry A. Jessell, *Utilities Getting into Telecommunications*, Broadcasting & Cable, Nov. 7, 1994, at 54.

[115] *See, e.g., Industry Giants Push Into Energy Management Market*, Comm. Daily, Feb. 28, 1995, at 8.

[116] *1994 Competition Report*, 9 FCC Rcd at 7539, ¶ 200.

[117] Leslie Ellis, *Set-Top Wars Won't Brew Til '96*, Multichannel News, Feb. 13, 1995, at 3.

[118] Paul Kagan Associates, Inc., *Marketing New Media*, Feb. 20, 1995, at 1.

[119] *Id.*

68. A third potential barrier may be the supply of digitally encoded programming. The process of converting analog programming to a digital format has gone through many refinements, but it still imposes additional costs.[120] As digital distribution channels begin to emerge, the amount of digital programming will grow, but it may be a number of years before digitally encoded programming displaces analog programming. We ask for comment on the amount of digital programming that is available.

69. In connection with these developments, we invite comments concerning the following questions:

(a) How will competitors using different technologies take advantage of digital compression to enhance their services? Are some competitors likely to derive a greater benefit than others by the use of digital compression?

(b) Is it more likely that digital compression will result in convergence of costs and services among competitors using different technologies, or is it more likely that it will lead to greater divergence among competitors?

(c) What will be the likely barriers, if any, to the deployment of digital compression technology? How can the Commission remove barriers to deployment of this technology?

70. The Commission also expects to explore in the 1995 Competition Report the different transmission media used for distribution of multichannel video programming, such as copper wire, coaxial cable, optical fiber, broadcast and other terrestrial radio frequency communications, terrestrial microwave and satellites, and how they affect, and will affect, industry structure and competition for the provision of video services. We will also explore the hybridization of different transmission media as well as system configurations and designs which may also affect competition. In connection with these issues, we intend to develop information concerning the competitive effects of the various compression, modulation, digitization, multiplexing, data storage and switching techniques that are designed to increase network capacity, efficiency and functionality, and to enhance available services.

71. In connection with these issues, we invite comments concerning the following questions:

(a) What are the capabilities of each technology and the types of services for which each may be applicable?

(b) How will the new technologies be combined with existing technologies?

(c) When will these technological advances be deployed and what is the potential competitive impact of the deployment of these advances?

(d) What changes can be expected from the widespread availability of such technologies? Will technological advances principally affect distribution in local or national markets, or will it affect both equally?

(e) Should the Commission's regulatory framework be modified in any way to eliminate impediments to the competitive deployment of these new technologies?

(f) Should the Commission adopt standards for any or all of these transmission media?

72. The Commission is also interested in technologies that will facilitate consumer access to the various distribution media and services they are expected to provide. To facilitate consumer needs in the video services area, the Commission established new cable-consumer equipment compatibility regulations, which include measures that assure improved compatibility between existing cable system equipment and consumer television equipment. They also include provisions for achieving more effective compatibility through new cable and consumer equipment.[121]

73. The Commission is aware that future cable services may require additional functionality for set-top boxes/terminals. In connection with these set-top boxes/terminals we invite comments concerning the following questions:

(a) What are the advantages and disadvantages of having subscribers own set-top boxes?

(b) What functionalities are included in current set-top boxes?

(c) To what extent can set-top boxes be purchased or leased from sources other than cable operators?

(d) To what extent do current market conditions, including Commission rules and regulations, inhibit the development of a competitive market for set-top boxes?

(e) Could a competitive retail market develop for consumer-owned set-top boxes? What is the potential size and structure of such a market? Should the Commission take steps to promote the development of a competitive retail market for set-top boxes that is separate from markets for the provision of video services?

(f) We also seek comment about future cable and broadband services that are projected to require additional functionality for set-top boxes, and what steps, if any, the Commission might take to ensure development of a competitive market for such equipment.

## V. MARKET STRUCTURE AND COMPETITION

74. The Commission intends to explore in the 1995 Competition Report the status of horizontal concentration and vertical integration in the cable television industry and market structure conditions, such as economies of scale and scope and extensive sunk cost investments, which may

[120] Interactive Age, *What Does Encoding Cost?*, Nov. 14, 1994, at 36.

[121] *Implementation of Section 17 of the 1992 Cable Act (Compatibility Between Cable Systems and Consumer Electronics Equipment), First Report and Order*, ET Docket No. 93-7, 9 FCC Rcd 1981 (1994), *recon. pending.*

affect competition in markets for the delivery of video programming. The information that the Commission develops, both from publicly available sources and comments filed in response to this *NOI*, will be used to assess the performance of the market for delivered video programming and to analyze developments that have the potential to change that performance.

### A. Horizontal Concentration in the Cable Industry

#### *1. Horizontal Concentration in Local Markets*

75. Horizontal concentration refers to the number and market shares of sellers in the video marketplace. Since the *1994 Competition Report*, DBS has become available nationwide. In most franchise areas, DBS and HSD are the only alternatives to the single cable operator as sources of multichannel video programming that are available to cable subscribers. Where other alternative multichannel video distributors exist, their market share is generally small. In the 1995 Competition Report, the Commission would like to identify as many markets as possible where cable operators face competition from MVPDs other than DBS operators or HSD package programmers, and develop a picture of what that competition is like. In particular, the Commission would like to obtain information concerning: (a) the identity and type of competitor; (b) when it entered; (c) the location of the market, including whether it is predominantly urban or rural; (d) an estimate of the subscribership and market share for the services of the competitor(s); (e) a description of competitive service offerings; (f) the prices charged for these offerings; and (g) the incumbent's competitive responses. In this regard, we invite comments on these issues from any parties with specific information on competition in local markets and any other matters that they feel are relevant to the issue of local competition.

76. The Commission also recognizes that the use of the franchise area as the relevant geographic area is subject to question. Some viewers within a franchise area may have access and subscribe to competitive alternatives such as services from SMATV, MMDS or DBS operators, but subscribing viewers may not be sufficient in number to meet the "effective competition" definition of the 1992 Cable Act. Nonetheless, cable service providers may be competitively constrained by the availability of these services.[122] Competitors in local markets may also forego price competition, and instead focus their energies on differentiating their services from those of competitors, particularly in terms of the amount and types of programming offered or their responsiveness to customer needs and complaints. We seek comment on the foregoing.

#### *2. Horizontal Concentration Nationally*

77. Concentration at the industry level is also significant because the market for the delivery of video programming may be evolving toward a national market. In addition, the market for programming, in which producers supply their programming to distributors, appears to be national in scope. When it enacted Section 11 of the 1992 Cable Act, Congress recognized that there are beneficial and harmful effects from increased horizontal concentration.[123] In light of these effects, we seek to identify the share of cable subscribers nationwide served by each company or MSO. Large MSOs may be able to operate more efficiently in a variety of areas, including administration, distribution and procurement of programming. However, large MSOs also may be able to obtain concessions from cable programmers in exchange for carriage, which could discourage the entry of new programming services and adversely impact the diversity of programming available to consumers. In this *NOI*, we seek information that will allow us to continue to monitor industry concentration and to assess its effects on the video marketplace.[124]

78. In the *1994 Competition Report*, the Commission reported that there has been a moderate increase in the nationwide horizontal concentration of the cable industry since the issuance of the *1990 Cable Report*, as measured by the Herfindahl-Hirschman Index ("HHI"),[125] which is a standard measure of horizontal concentration.[126] Whether an HHI measurement, or any measure of concentration at the national level, is meaningful depends on the existence of a national cable market. As we discussed,[127] the relevant market for the purpose of analyzing competition in the cable industry is generally local, although there may be larger markets in the future, should other technologies become competitive. When examining issues involving cable programming, however, the relevant geographic market may well be national, and in that context, the national HHI provides more useful information.

79. The Commission found in the *1994 Competition Report* that the national market for the distribution of cable services was unconcentrated as of the end of the first quarter of 1994. The HHI for the industry as of March 31, 1994, was 898, which represented a modest increase since 1990.[128] Based on industry reports, TCI had the largest

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[122] *TEL-COM, INC. (Petition for Reconsideration of Certification of West Virginia Cable Television Advisory Board to regulate basic cable rates (WV0630 & WV0628)), Memorandum Opinion and Order*, 10 FCC Rcd 2114 (1995).

[123] *See* House Committee on Energy and Commerce, H.R. Rep. 623 ("House Report"), 102d Cong., 2nd Sess. at 42-43 (1992).

[124] In the 1992 Cable Act, Congress required the Commission to establish limits on the number of cable subscribers that an entity is authorized to reach through cable systems it owns, controls or in which it holds an attributable interest. Communications Act § 613(f)(1)(A), 47 U.S.C. § 533(f)(1)(A). To implement this requirement, the Commission established a 30% limit on the number of homes passed nationwide, or 35% if the additional systems are "minority-controlled," that any one entity can reach through its cable systems. *See Implementation of Sections 11 and 13 of the 1992 Cable Act, Second Report and Order*, MM Docket No. 92-264, 8 FCC Rcd 8565 (1993) (*"Subscriber and Channel Occupancy Limits Order"), recon. denied, Memorandum Opinion and Order on Reconsideration of the Second Report and Order*, FCC 95-147 (Apr. 5, 1995). Following a federal district court ruling that Section 11(c) of the 1992 Cable Act is unconstitutional, the Commission stayed enforcement of its horizontal ownership rules. *See Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C.), *appeal docketed and pending*, Civ. Act. No. 93-5290 (D.C. Cir. 1993).

[125] *See 1994 Competition Report*, 9 FCC Rcd at 7586-88, App. G, Tbls. 1 & 2.

[126] The HHI is calculated by summing the squares of the firms' percentage shares of the market. *1992 Horizontal Merger Guidelines*, ¶ 1.5, 4 Trade Reg Rep. (CCH) ¶ 13,104, at 20,573-4 to 20,573-6.

[127] *1994 Competition Report*, 9 FCC Rcd at 7467-68, ¶ ¶ 49-53.

[128] *Id.* at 7586, App. G, Tbl. 7.

market share, 24.8%,[129] an increase of less than one percentage point since 1990. The top four companies still had 47% of the market, and the top ten 63%.

80. By the middle of September 1994, however, transactions had been announced that would significantly alter the market shares of those ten companies. We found that, if those transactions were consummated, the HHI would rise to approximately 1051.[130] Standard antitrust analysis considers a market with an HHI between 1000 and 1800 to be "moderately concentrated."[131] As expected, those transactions were consummated. Moreover, several additional mergers have been announced that will result in further national concentration.[132]

81. In order to evaluate fully the effects of horizontal concentration nationally, we intend to update and expand on the information that was provided in the *1994 Competition Report*, including that which was presented in Appendix G.[133] We note that the *1994 Competition Report*'s analysis of these issues was based largely on public information, and we intend to use such information to the extent possible in the 1995 Competition Report. Commenters should nevertheless feel free to comment or provide any information on the foregoing that they wish to bring to our attention. In addition, we invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider. In addition, we seek comment on the following:

(a) What are the reasons for the recent transactions that have resulted in the substantial increases in horizontal concentration nationally?

(b) What are the potential procompetitive and anticompetitive effects of horizontal concentration nationally?

(c) To what extent does national concentration actually affect competition in markets for the delivery of video programming? Should the Commission be concerned about the increases in such concentration?

82. In addition to analyzing the concentration of the cable industry at the national level, we believe it is appropriate to evaluate the concentration of ownership on a regional basis. In the *1994 Competition Report*, the Commission wrote, "|c|oncentration in regional, or locally clustered, marketing areas may also be pro-competitive or anti-competitive."[134] We noted that "regional concentration may result in significant efficiencies," and "may also reflect the desire of cable operators to enter the telephone business, or it may reflect strategic decisions by cable operators to position themselves to compete against LECs that are poised to enter the market for the distribution of multichannel video programming."[135] These efficiencies from clustering were recognized by the Cable Services Bureau in its decision approving license transfers associated with Cox Cable Communications, Inc.'s acquisition of the cable systems of Times Mirror Company.[136] We invite comments concerning these and other possible procompetitive reasons for clustering.

83. On the other hand, we also noted that there may be "competitive risks associated with increased regional clustering of commonly owned cable systems."[137] In particular, we wrote that "[a] possible consequence of the accumulation of large regional clusters of interconnected cable systems is that such systems may send an entry-deterring signal to potential rivals."[138] The Commission did not resolve the issue, however, concluding instead that even this possible effect of clustering was not unambiguously anticompetitive because "there may exist complex tradeoffs between the potential consumer benefits that are provided by the sunk cost investments of incumbent cable systems and the potential consumer benefits that new entrants may offer consumers if not deterred by incumbent cable systems." We also invite comments concerning these and other possible competitive effects of clustering.

### B. Vertical Integration in the Cable Industry

84. A cable company is vertically integrated if it is affiliated with an owner of an interest in any video programming that is carried by cable systems and other MVPDs. Sections 11, 12 and 19 of the 1992 Cable Act were enacted to limit the ability of vertically integrated cable operators and other satellite programming vendors to inhibit competitive entry into the programming supply and distribution markets. These sections were enacted to ensure

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[129] *Compare Subscriber and Channel Occupancy Limits Order*, 8 FCC Rcd at 8578, ¶ 27 n.40, which includes all systems in which TCI has an attributable interest.

[130] *1994 Competition Report*, 9 FCC Rcd at 7586, App. G, Tbl. 1A. These transactions were (1) TCI's acquisition of TeleCable (which had been the 18th largest MSO), which added over 700,000 subscribers to TCI's total; (2) Comcast's acquisition from Rogers Communications ("Rogers") of those systems in the United States that Rogers acquired from Maclean Hunter (which had been the 28th largest MSO) earlier this year; (3) Cox Cable Communications, Inc.'s acquisition of the cable systems of Times Mirror Company (which had been the 10th largest MSO); and (4) Time Warner's consolidation in a joint venture of certain of its systems with those operated by Newhouse Broadcasting Corp. and Advanced Publications, Inc. (which were together the 7th largest MSO), and its purchase of Summit Communications Corporation (which had 160,000 subscribers). *Id.* at 7515, ¶ 145.

[131] 1992 *Horizontal Merger Guidelines*, ¶ 1.51, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573-5 to 20,573-6.

[132] For example, Time Warner has announced agreements to acquire Cablevision Industries (which is the 8th largest MSO), and the KBLCOM systems from Houston Industries (which is the 22nd largest MSO). *See* Rich Brown, *Time Warner Eyes 2.5 Million Subs for $5 Billion*, Broadcasting & Cable, Jan. 23, 1995, at 4. Continental Cablevision has agreed to buy the cable systems of the Providence Journal (which is the 17th largest MSO). *See Cable Clustering Makes for Active Market*, Broadcasting and Cable, Mar. 6, 1995, at 53-54. Sammons Communications, Inc (which is the 14th largest MSO), has agreed to sell approximately two-thirds of its cable systems to Marcus Cable, and its remaining systems to Lenfest Group and TKR Cable, entities in which TCI has an ownership interest. *See* Rich Brown, *Sammons Bags $1 Billion*, Broadcasting & Cable, Mar. 13, 1995, at 11; *TCI Picks Up Cable Systems in N.J., Pa.*, Broadcasting & Cable, Mar. 27, 1995, at 14.

[133] *1994 Competition Report*, 9 FCC Rcd at 7586-603, App. G.

[134] *Id.* at 7518, ¶ 151.

[135] *Id.* at 7518-19, ¶ ¶ 152-53.

[136] *Cox Cable Communications Inc and Times Mirror Company (Transfer of Control), Memorandum Opinion and Order*, File No. CAR-44842-10, 10 FCC Rcd 1559 (CSB 1994).

[137] *1994 Competition Report*, 9 FCC Rcd at 7519, ¶ 154.

[138] *Id.* at 7519-20, ¶ ¶ 155.

that vertically integrated cable operators do not engage in anticompetitive practices that limit the ability of unaffiliated video programming vendors to secure carriage on their cable systems. In addition, these provisions are intended to prevent MSOs from limiting competing multichannel video program distributors' access to the programming sources owned by those MSOs and to ensure that such programming is available on fair, nondiscriminatory terms.

85. Specifically, Section 11 of the 1992 Cable Act, in part, required the Commission to establish limits on the number of channels on a cable system that can be occupied by programming services in which the operator has an attributable interest.[139] To implement this provision, the Commission adopted "channel occupancy limits," under which a vertically integrated cable system may devote no more than 40% of its activated channels to national video programming services in which the system operator has an "attributable interest."[140]

86. Section 12 required that the Commission adopt rules governing program carriage agreements and related practices between cable operators and other MVPDs and video programming vendors.[141] We adopted rules that prohibit cable operators from coercing programming vendors into granting them exclusive distribution rights and from discriminating against program suppliers on the basis of the operator's ownership interests ("program carriage" rules).[142]

87. Section 19 prohibits unfair competitive practices by vertically integrated satellite cable programming vendors, satellite broadcast cable programming vendors, and cable operators, including certain limits on exclusivity provisions in cable carriage agreements.[143] To implement this section of the 1992 Cable Act, the Commission adopted rules to prevent discriminatory behavior and restrict the types of exclusive contracts that may be entered into between cable operators and vertically integrated program vendors ("program access rules").[144]

88. In the 1995 Competition Report, the Commission intends to update the information presented in the *1994 Competition Report* relating to vertically integrated and unaffiliated programming services, and in particular the information in Appendix G. In last year's report, a significant amount of information concerning vertical integration was provided in comments filed by parties to the proceeding. Nonetheless, it appears that the Commission can rely to a certain extent on publicly available information. We invite comments on any problems with the information presented last year, the method used to develop the information, or any additional information that the Commission should consider. We also request comments and information concerning:

(a) The existing national programming services, and the extent to which they are affiliated with cable operators. In particular, the Commission would like to provide a description of the amount and type of interest, the date such interest was acquired, any changes since last year, and the percentage of ownership represented by each MSO's holdings for each programming service that is affiliated with cable interests;

(b) The national programming service launches that have occurred over the past year, and the extent to which those services are affiliated with cable system operators;

(c) The national programming services that have been announced for launch since last year, and to what extent they are affiliated with cable operators;

(d) The number of subscribers and number of cable systems served by individual programming networks;

(e) The audience ratings, primetime or all day parts, of national cable programming services;

(f)The ownership of national cable programming services by entities that are existing or potential competitors (e.g., broadcast networks) to cable systems.

89. The channel occupancy rules were intended to ensure that unaffiliated programmers have sufficient opportunity to distribute their programming through cable carriage by limiting the number of channels that can be dedicated to MSO-affiliated programming services.

(a) Has the ability of program vendors, both affiliated and unaffiliated, to secure carriage been affected by the channel occupancy rules? Have these rules led to greater channel availability so that unaffiliated programmers can reach the desired number of subscribers?

(b) What effect have the occupancy limits had on the ability of programmers, affiliated and unaffiliated, to launch new programming services? What is the market penetration needed to launch a new programming service? Do the channel occupancy rules allow sufficient channel capacity for an unaffiliated programmer to receive carriage by enough cable systems to successfully launch a new service?

(c) Has MSO investment in programming services been affected by these rules?

90. The 1992 Cable Act attempted to address difficulties that non-cable MVPDs faced in acquiring programming

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[139] Communications Act § 613(f)(1)(B), 47 U.S.C. § 533(f)(1)(B).

[140] *See Subscriber and Channel Occupancy Order. See also* 47 C.F.R. §§ 76.501, 76.504. A cable operator may devote two additional channels or up to 45% of its channel capacity, whichever is greater, to the carriage of video programming owned by the cable operator or in which the operator has an attributable interest provided such video programming services are minority controlled.

[141] A video program vendor is defined as anyone engaged in the production, creation or wholesale distribution of video programming for sale. Communications Act § 616, 47 U.S.C. § 536.

[142] *See Implementation of Sections 12 and 19 of the 1992 Cable Act (Development of Competition and Diversity in Video Programming Distribution and Carriage), Second Report and Order,* MM Docket No. 92-265, 9 FCC Rcd 2642 (1993), *recon. granted, Memorandum Opinion and Order,* 9 FCC Rcd 4415. *See also* 47 C.F.R. §§ 76.1300-1302.

[143] Communications Act § 628, 47 U.S.C. § 548.

[144] *See Implementation of Sections 12 and 19 of the 1992 Cable Act (Development of Competition and Diversity in Video Programming and Carriage), First Report and Order,* MM Docket No. 92-265, 8 FCC Rcd 3359 (1993) *recon. denied in part,* 10 FCC Rcd 1902 (1994). *See also* 47 C.F.R. §§ 76.1000-76.1003.

services on nondiscriminatory terms.[145] We request comment on whether the program access rules and our decisions in response to program access complaints have served their intended purpose to alleviate this problem.[146] The Commission requests comments concerning the following questions:

(a) How have the program access rules affected the number of and competition among MVPDs?

(b) Are MVPDs now able to get programming that was previously unavailable?

(c) Is this programming available on nondiscriminatory terms? Have the program access rules had an effect on the price and terms offered to alternative MVPDs?

(d) Are there differences in the treatment of the various distribution technologies with respect to access? For example, are there differences between wireless cable, DBS and HSDs? Do differences exist in rural versus urban areas?

(e) Has our complaint process worked to ensure that programming is available to alternative MVPDs?

(f) Has investment in, and the development of, new programming ventures been adversely affected by the program access rules?

(g) Should the program access rules apply to LEC access to cable programming when a LEC is offering multichannel video programming service in competition with a franchised cable system, whether through the VDT framework or a franchised overbuilt cable system? Should the program access rules apply to LECs' programming in such situations?

(h) Should the program access rules be extended to non-vertically integrated program providers?

(i) Have the nondiscriminatory rate provisions (e.g., the volume discount provision) of the program access rules affected the competitive viability of small systems and small system operators?

91. Furthermore, we seek comment on whether the program carriage rules adopted to implement Section 12 of the 1992 Cable Act have served to diminish anticompetitive practices. Are the rules working to ensure that cable operators do not take unfair advantage of programming vendors as a condition of carriage agreements? Have negotiations for carriage agreements changed? Are there other practices of which the Commission should be aware regarding program supply?

### C. Market Performance Indicators

92. In the *1994 Competition Report*, the Commission looked at several market performance indicators.[147] Those indicators included: (a) q ratio measurements; (b) evidence concerning price changes in local markets following the entry of overbuilders; (c) competitive price differentials that had been calculated in prior Commission orders; (d) changes in industry-wide demand; (e) changes in industry-wide revenue; (f) increases in availability of programming; and (g) increases in industry-wide capital investment. We invite comment concerning the use of these market performance indicators, any updates of these indicators, the conclusions that were drawn in the *1994 Competition Report*, and the appropriate method or methods for assessing market performance.

### D. Market Structure Characteristics that May Increase Concentration or Pose Impediments to Competition

93. The *1994 Competition Report* considered economies of scale and scope in cable.[148] Economies of scale exist when the average cost of production decreases as the quantity of output produced by a firm increases. For example, economies of scale exist in cable if a single operator can produce cable services at lower cost than two operators could in the same market. In that case, higher concentration might result from the lower costs of production that would be achieved. Economies of scope exist when two products can be jointly produced at lower cost than if they were produced separately. Thus, economies of scope may exist in video distribution and telephony if it is more efficient to simultaneously provide telephone and multichannel video programming services over the same distribution plant than it is to provide them separately. We invite comments concerning economies of scale and economies of scope in the cable industry.

94. The presence of barriers to entry is one of the most important obstacles to the development of a competitive market.[149] In the *1994 Competition Report*, the Commission looked at regulatory and technological impediments to entry in markets for the delivery of multichannel video programming, including the Communications Act's definition of a cable system, state laws impeding competitive entry, pole attachment issues, and the introduction of digital compression and other technologies.[150] We invite comments concerning these and any other impediments to competitive entry into markets for the delivery of multichannel video programming. We also invite comments on the overall magnitude of barriers to entry into these markets, and actions the Commission should take to reduce or eliminate barriers to entry.

95. In the *1994 Competition Report*, the Commission considered the presence of substantial sunk cost investments in the cable industry, and their effect on incentives for incumbent MVPDs to engage in strategic behavior designed to protect those investments.[151] Among the kinds of strategic behavior that could deter entry are controlling access to program supply, using litigation to delay or prevent entry, pricing services below incremental costs, and foreclosing access to customers through anticompetitive exclusive dealing. We invite comments concerning that analy-

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[145] 1992 Cable Act, sec. 2(a)(5). House Report at 40. Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92 ("Senate Report"), 102d Cong., 1st Sess. at 26 (1991).

[146] As of May 4, 1995, the Commission had resolved 12 program access cases and 7 program access cases were pending.

[147] *1994 Competition Report*, 9 FCC Rcd at 7542-50, ¶ ¶ 204-27; 9 FCC Rcd at 7604-31, App. H.

[148] *Id.* at 7616-27, App. H., ¶ ¶ 20-44.

[149] *See, e.g., McGahee v. Northern Propane Gas Co.*, 858 F.2nd 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

[150] *1994 Competition Report*, 9 FCC Rcd at 7554-6, ¶ ¶ 239-245.

[151] *Id.* at 7550-54, ¶ ¶ 229-238.

sis and the implications of sunk costs for competitive entry into markets for the delivery of multichannel video programming.

## VI. RECOMMENDATIONS FOR PROMOTING COMPETITION IN THE MARKET FOR DELIVERED VIDEO PROGRAMMING

96. The legislative history of Section 19 of the 1992 Cable Act states that Congress expected the Commission to address and resolve problems regarding "unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."[152] Congress also mandated that the Commission encourage arrangements which promote new technologies and extend programming to areas not served by cable.[153] Thus, commenters are asked to consider whether there are any actions that the Commission should take to foster competition in the market for video programming delivery. In light of the current state of competition and our desire to promote additional competition, we request that parties recommend rules or policies, if any, that should be adopted, amended or eliminated to accomplish this goal. Parties submitting recommendations should explain how their proposals would increase competition in the provision of video programming to consumers or enhance the program distribution market. We also want to consider any other effects of such proposals on the cable industry.

## VII. PROCEDURAL MATTERS

97. This NOI is issued pursuant to authority contained in Sections 4(i), 4(j), 403 and 628(g) of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before June 30, 1995, and reply comments on or before July 28, 1995. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

98. There are no ex parte or disclosure requirements applicable to this proceeding pursuant to 47 C.F.R. § 1.1204(a)(4).

99. Further information on this proceeding may be obtained by contacting Marcia Glauberman, Jonathan Ogur or Edward Hearst in the Cable Services Bureau at (202) 416-0800 or Martin L. Stern or Jeffrey Lanning in the Office of the General Counsel at (202) 416-0865.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[152] House Committee on Energy and Commerce, H.R. Rep. No. 862 ("Conference Report"), 102d Cong., 2d Sess. at 93 (1992).
[153] *Id.*

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
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| Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services | PR Docket No. 94-104 |

And

In the Matter of

| | |
|---|---|
| Implementation of Sections 3(n) and 332 of the Communications Act | GN Docket No. 93-252 |

Regulatory Treatment of Mobile Services

**REPORT AND ORDER**
**AND**
**ORDER ON RECONSIDERATION**

**Adopted: May 4, 1995;** **Released: May 19, 1995**

By the Commission:

## I. INTRODUCTION

1. On August 8, 1994, the Arizona Corporation Commission ("Arizona" or "ACC"), on behalf of that State, petitioned to retain state regulatory authority over the rates of intrastate commercial mobile radio services and the entry of commercial mobile radio service providers, within Arizona.[1] Sixteen parties filed pleadings opposing the petition, and one party, the National Cellular Resellers Association, filed a pleading supporting it.[2] By this action, we deny the petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

## II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.[3] Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;[4] (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;[5] and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.[6]

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of CMRS.;[7] As an exception to this general rule, Congress also provided that, if a State had "any regulation" concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."[8]

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state seeking to retain regulatory authority must "clear substantial hurdles" in demonstrating that continued regulation is warranted.[9] We also determined that the nature of a state's burden of proof is delineated generally by the statute itself. Specifically, we found that:[10]

> [I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of

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[1] Petition of the Arizona Corporation Commission To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services, PR Docket No. 94-104, filed Aug. 9, 1994 (hereinafter "Arizona Petition").

[2] A list of parties that filed pleadings in this proceeding appears at Appendix A.

[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

[4] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (1994) (*CMRS Second Report and Order), reconsideration pending.*

[5] National Telecommunications and Information Administration Organization Act, § 113(b)(1).

[6] The competitive bidding methodology is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays ...." 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

[7] *See* 47 U.S.C. § 332(c)(3)(A).

[8] *See* 47 U.S.C. § 332(c)(3)(B).

[9] *See CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[10] *Id.*, 9 FCC Rcd at 1421.

telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [*sic*] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be grounded on demonstrable evidence.[11] In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be pertinent and helpful to our consideration of a state petition.[12] Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.[13] We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.[14] In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising Federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."[15] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

## III. DECISIONAL FRAMEWORK

### A. *Pleadings*

6. CTIA asserts that states must prove with evidence of market conditions that rate regulation is necessary to protect against market failure within that state.[16] The Association contends that this burden is difficult, if not impossible, to carry in light of competitive forces in the marketplace.[17] Century asserts that the statute imposes a heavy burden on petitioners.[18] GTE argues that Congress preempted state regulation of rates and market entry except in very limited circumstances.[19] GTE asserts that forbearance from regulation is warranted where the cost of complying with regulatory burdens exceeds the benefit to be derived from adherence to those requirements.[20] GTE states that this Commission found in the *CMRS Second Report and Order* that forbearance from Federal tariffing requirements was warranted because the cellular marketplace is sufficiently competitive to outweigh the benefits of compliance with those rules.[21] GTE concludes that states seeking to continue regulating CMRS rates must satisfy a heavy burden of proof.[22] A state's showing, GTE contends, must be sufficient to overcome this Commission's finding that the CMRS marketplace is competitive and capable of producing just and reasonable rates.[23]

### B. *Discussion*

7. In order to prevail on the merits, the ACC must sustain its statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[24] A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties' debate in this record. As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state's petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service[25] have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

8. Since the Budget Act does not explicitly construe or elaborate on the phrase "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory," we look to the "design of the statute as a whole and its object and policy" to give that phrase meaning.[26] We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also

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[11] *Id.*, 9 FCC Rcd at 1504.
[12] 47 C.F.R. § 20.13.
[13] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505.
[14] Under *Louisiana PSC*, the Commission may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana Pub. Ser. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal policy. *See* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); National Ass'n of Reg. Util. Comm ners v. FCC, 880 F.2d 422 (D.C. Cir. 1989).
[15] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).
[16] CTIA Opposition at iii, 3-10.
[17] *Id.*
[18] Century Comments at 5.
[19] GTE Comments at 3.
[20] *Id.* at 6.
[21] *Id.* at 9.
[22] *Id.* at 12.
[23] *Id.* at 12.
[24] 47 U.S.C. § 332(c)(3).
[25] Although the provisions of Section 332(c)(3) of the Act apply to rate or entry regulation in the case of any commercial mobile radio service provider, the ACC Petition is oriented to the provision of cellular service.
[26] *See* Crandon v. United States, 494 U.S. 152, 157 (1990);

speak of just and reasonable rates.[27] We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive market operations.[28] The more formal description, however, is whether rates fall within a "zone of reasonableness" that is bounded at one end by the "investor interest in maintaining financial integrity and access to capital markets" and at the other by the "consumer interest in being charged non-exploitative rates."[29] Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by reference to carriers' costs and earnings,[30] but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.[31] These principles define basic components of a state's demonstration under Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a "zone of reasonableness," which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

9. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: "no State ... shall have any authority to regulate" CMRS rates.[32] As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) ("State Preemption"), express an unambiguous congressional intent to foreclose state regulation in the first instance.[33] Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation,[34] and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.[35]

10. Unlike some of the opponents of the ACC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;[36] (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed "rapidly" through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal of stimulating economic opportunity and competition;[37] and (3) in contemplation of the deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.[38]

11. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving,[39] and it provided the resources (*e.g.*, additional spectrum) and administrative au-

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McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[27] *See* 47 U.S.C. § 201; *see also* 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

[28] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886 (para. 25), 2889-2900 (1989); *see also* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.

[29] *See, e.g.*, FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988); *see also* FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

[30] *See* FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs.") (citation omitted); *see also* Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05, *reh'g denied*, Bass v. FPC, 392 U.S. 917 (1968) (upholding ratemaking based upon area-wide average costs).

[31] *See, e.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

> Mobil's argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional "non-cost" incentives on the evidence of a need for increased supplies.

*Id.* at 316. *See also* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); Public Service Comm'n of New York v. FERC, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

[32] 47 U.S.C. § 332(c)(3).

[33] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[34] 47 U.S.C. § 332(c)(1)(A).

[35] 47 U.S.C. § 332(c)(1)(C).

[36] OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

[37] *See* OBRA § 6002(a), amending Section 309 of the Communications Act.

[38] *See* 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

[39] The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. *See* Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international allocations decision making fora that recognized and

thority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.[40] Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.[41]

12. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of "market conditions" in the context of Section 332(c)(3) necessarily is governed by that framework.

13. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that Arizona, or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Commission established the two-carrier cellular market structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities.[42] Other Federal agencies have taken similar positions.[43] One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that "[w]hile GAO found no evidence of anticompetitive or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."[44] It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly prohibited state regulation of CMRS.[45] Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.[46]

14. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.[47] For example, we have attempted to heighten cellular competition at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between the two licensees in each local market.[48] We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.[49] Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

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permitted the use of such spectrum for PCS and other emerging technologies on a global scale. *See* Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. *See* OBRA § 6002(d)(2)(B).

[40] *See CMRS Second Report and Order*, 9 FCC Rcd at 1421; *see also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

[41] *Id.*

[42] *See, e.g.*, Cellular Communications Systems, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

[43] *See* Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 ("[T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]"); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 ("[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market."), 10-12.E

[44] United States General Accounting Office, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," GAO/RCED-92-220 (July 1992) (GAO Report).

[45] *Cf.* Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord* Miles v. Apex Marine Corporation, 489 U.S. 19 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Minneapolis & St. Louis Railway Co. v. United States, 361 U.S. 173 (1959).

[46] *Cf.* McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

[47] *See, e.g.*, GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. *See* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

[48] *See Cellular Resale Order*, 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry*), Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

[49] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

15. The framework of our CMRS regulatory policy – moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by regulating existing licensees – aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.[50] As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,[51] not a policy that is balkanized state-by-state.

16. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work. With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:[52]

> [i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

17. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impossible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that Congress would have established two separate statutory procedures – one to govern our forbearance, and another to govern states' petitions[53] – if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

18. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,[54] and such conditions can produce good results for consumers.[55] In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

19. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to perform a Structure-Conduct-Performance ("SCP") analysis,[56] which is a standard paradigm of modern industrial organization analysis.[57] This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the number of competitors, the cost structure, and the degree of integration with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry structure and allows us to determine whether and how consumer interests are being served by such activity.

20. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order

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[50] If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

[51] See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

> [B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

[52] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

[53] *See* 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

[54] In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. *See* D. Carlton & J. Perloff, Modern Industrial Organization 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

[55] *See, e.g.*, W. Baumol, J. Panzar & R. Willig, Contestable Markets and the Theory of Industry Structure 15-46 (1982).

[56] Section 20.13(a)(1) requires states to include "demonstrative evidence" establishing failed market conditions. *See* 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. *See* 47 C.F.R. § 20.13(a)(2)(vi).

[57] *See, e.g.*, F. Scherer & D. Ross, Industrial Market Structure and Economic Performance, 4-7 (3d ed. 1990) ("Scherer and Ross"); D. Carlton & J. Perloff, Modern Industrial Organization, chs. 1, 9 (2d ed. 1994); J. Tirole, The Theory of Industrial Organization 1-3 (1988).

to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce "specific allegations of fact," to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding "anticompetitive or discriminatory practices or behavior by commercial mobile radio service providers."[58] We also requested "[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces," and we indicated that we would consider such evidence "especially probative."[59]

21. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,[60] and "an assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state."[61] We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.[62] In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on "trends" in each commercial radio provider's rates and customer base[63] and on "opportunities for new providers to enter into the provision of competing services" as well as "an analysis of any barriers to such entry."[64] In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they see fit,[65] the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

22. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

23. While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.[66] Under the caselaw potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors,[67] and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in markets encompassing Arizona have committed to pay substantial sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment.

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[58] 47 C.F.R. § 20.13(a)(2)(vi).
[59] 47 C.F.R. § 20.13(a)(2)(vii).
[60] 47 C.F.R. § 20.13(a)(2)(i) and (ii).
[61] 47 C.F.R. § 20.13(a)(2)(iv).
[62] 47 C.F.R. § 20.13(a)(2)(viii).
[63] 47 C.F.R. § 20.13(a)(2)(ii) and (iii).
[64] 47 C.F.R. § 20.13(a)(2)(v).
[65] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.
[66] *See, e.g.*, McCaw Personal Communications, Inc. v. Pacific Telesis Group, 645 F. Supp. 1166, 1174 (N.D. Cal. 1986) ("the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high"), *citing* United States v. Waste Management, Inc., 743 F.2d 976, 982-83 (2d Cir. 1984). *See also* American Bar Association, I Antitrust Law Developments (Third) 307-11 (1992) and cases cited therein.0
[67] *See* FTC v. Owens-Illinois, Inc., 681 F. Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning "the extensive present and future intermaterial competition in the glass and other packaging industries," "[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic"); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992)(*Merger Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: "In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact") (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

BROADBAND PCS AUCTION RESULTS

| Arizona | | | | | |
|---|---|---|---|---|---|
| **MTA #** | **Freq. Blk.** | **State** | **Market** | **Winning Bidder** | **Winning Bid** |
| M027 | A | Arizona | Phoenix | AT&T Wireless PCS Inc. | $78,347,000 |
| M027 | B | Arizona | Phoenix | WirelessCo, L.P. | $75,608,434 |
| M039 | A | New Mexico | El Paso-Alberquerque | Western PCS Corporation | $8,634,030 |
| M039 | B | New Mexico | El Paso-Alberquerque | Pacific Telesis Mobile Services | $8,634,000 |
| M002 | A | California | Los Angeles-San Diego | Cox Communications, Inc. | $251,918,526 |
| M002 | B | California | Los Angeles-San Diego | Pacific Telesis Mobile Services | $493,500,000[68] |

[68] This figure represents the amount to be paid by the pioneer's preference licensee, as required by Section 309(j)(13) of the Communications Act. *See* American Personal Communications, Washington-Baltimore MTA #10, Frequency Block A; Cox Cable Communications, Inc., Los Angeles-San Diego MTA #2, Frequency Block A; Omnipoint Communications, Inc., New York MTA #1, Frequency Block A; For Initial Authorizations in the Broadband Personal Communications Service, Memorandum Opinion and Order, 10 FCC Rcd 1101 (1994).

24. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It *is* happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge that reasonably soon they will face new competition from PCS licensees.[69] The advent of PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.[70] Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantial and pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

25. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

26. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the statutory goal of promoting investment in the cellular infrastructure. In that event, the rates underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

27. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic factors.[71] For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.[72] Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.[73] Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

28. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to

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[69] *See, e.g.*, Comm. Daily, Apr. 24, 1995, " *Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS* " (report on independent researcher's projection of cellular service rate cuts "up to 40%" over next two years); Comm. Daily, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is $24.99, with additional min. at 29 cents in home county, 99 cents elsewhere"); M. Mills, *Wireless: The Next Generation*, Wash. Post, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal -- Bell Atlantic, NYNEX Plan to Merge Their Mobile and Cellular Divisions as PCS Players Continue Consolidation*, InformationWeek, Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

[70] *See, e.g.*, Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 ("Description of Transaction and Public Interest Statement") at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending; Craig O. McCaw*, 9 FCC Rcd at 5862-63.

[71] *See, e.g.*, J. Tirole, The Theory of Industrial Organization 209-70 (1988).

[72] *Id.* at 239-70.

[73] In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.

be persuasive. Those demonstrations that are tied most closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

## IV. ARIZONA PETITION

29. On August 9, 1994, the Arizona Corporation Commission filed a petition requesting authority to continue regulating the rates and entry of providers offering commercial mobile radio services within Arizona.[74] According to Arizona, its authority to regulate CMRS offerings derives from its state Constitution, which grants the ACC powers including the authority to prescribe just and reasonable classifications, rates and charges, and other reasonable rules governing "public service corporations" for services rendered and business transacted within the State, and to prescribe the forms of contracts and the systems of keeping accounts of such corporations, subject to local supervision including local regulation of rates and charges.[75] The Arizona Constitution defines "public service corporations" as including "[a]ll corporations other than municipal engaged . . . in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers . . . ."[76]

30. The ACC notes that it deregulated mobile radio common carrier services in 1987,[77] except for cellular services.[78] The ACC requires that all wholesale rates, services, contracts, and classifications of cellular service offered in Arizona be approved by the ACC prior to implementation.[79] In addition, Arizona regulates entry of wholesale cellular carriers by conducting an evidentiary hearing and subsequently issuing a certificate authorizing service, and upon occasion establishing conditions to govern special circumstances.[80]

31. Although Arizona does not identify any specific commercial mobile radio service that it seeks to regulate, aside from cellular, its request to retain regulatory authority extends to all CMRS, including cellular.[81]

## V. CASE ON THE MERITS

### A. *Rate Regulation*

#### 1. Non-Cellular Services

##### a. Comments

32. AMTA, AMSC, E.F. Johnson, MTel, Nextel, PageMart, PageNet, PCIA, and Pittencrieff contend that Arizona's petition must be denied, at least with regard to the apparent request to regulate services that are not public cellular services. MTel, for example, states that Arizona provides examples of what it calls excessive and anti-competitive rates, but every example involves only cellular rates.[82] MTel and Pittencrieff assert that Arizona does not provide any evidence which substantiates the need for rate regulation for any CMRS other than cellular.[83] MTel asserts that the ACC therefore has failed to sustain the burden of proof required to meet the "market conditions" standard for paging and narrowband PCS.[84] Moreover, MTel asserts, the paging industry is highly competitive, as evidenced by both the high number of providers and the low rates for services available today. MTel states that competition for paging services in CMRS is increasing even more due to the addition of private paging carriers that were recently authorized to have exclusive use of their frequencies.[85] The very recent allocation of spectrum for narrowband PCS, MTel contends, is expected to heighten competition for existing paging companies as well as to assure a competitive PCS marketplace from the inception of service.[86]

33. AMTA, describing the high degree of competition among rates of private land mobile systems which have been reclassified as CMRS, opposes any state regulation of the entry or rates of such systems.[87] AMTA asserts that the petition is silent regarding intent to include reclassified private services within its regulatory framework, and the state provides no evidence that market conditions in this segment of the CMRS industry do not adequately protect subscribers.[88]

34. Nextel asserts that Arizona has not demonstrated that regulation of intrastate rates of non-dominant CMRS is necessary to protect subscribers. Rate regulation, Nextel states, would further inhibit the ability of emerging wireless providers to compete with cellular incumbents and would only benefit dominant cellular carriers.[89] Nextel points out that this Commission has recognized that the cellular marketplace is not fully competitive, and has acknowledged that all CMRS providers, other than cellular licensees, currently lack market power. Nextel asserts that these characterizations provide the basis for distinguishing among classes of CMRS providers in preempting state regulation. Continued regulation of cellular service providers may be necessary in order to prevent anticompetitive practices that

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[74] Arizona Petition at 1.
[75] Ariz. Const. art. 15, § 3, Arizona Petition App. 2.
[76] *See* Arizona Petition App. 2 (Ariz. Const. art. 15, § 2).
[77] ACC Decision No. 55633 (July 2, 1987).
[78] ACC Decision No. 56314 (Jan. 12, 1989).
[79] Ariz. Rev. Stat. Ann. §§ 40-374, 40-365.
[80] Arizona Petition at 8-9, 12-13.
[81] *See* Arizona Petition at 1 ("Petition to Extend State Authority over Rate and Entry Regulation of All Commercial Mobile Radio Services"), 22 ("The Arizona Commission urges the FCC to grant this Petition to retain entry and rate regulation over CMRS providers").
[82] MTel Comments at 5.
[83] *Id.; see also* Pittencrieff Comments at 3-4.
[84] MTel Comments at 6.
[85] *Id.* at 7.
[86] *Id.* at 8.
[87] AMTA Comments at 1, 6-7; *accord* E.F. Johnson Comments (requesting exemption of "local" SMR and 220 MHz land mobile systems from state rate regulation).
[88] AMTA Comments at 5-7.
[89] Nextel Comments at i-ii, 2, 7-9.

will stifle development of the wireless market,[90] according to Nextel, but Arizona makes no showing that regulation of non-dominant carriers is necessary, nor could it, since wide area SMR and PCS are not duopolists, nor do they command a transmission bottleneck.[91] If the potential future CMRS marketplace, with six different competitors, were the reality now, Nextel asserts, there would be no basis for state regulation at all.[92] PageNet opposes the Arizona Petition to the extent that the state seeks to regulate non-cellular CMRS, and asserts that the statutory standard has not been met.[93] PCIA argues that Arizona does not even attempt to justify continued regulation of paging services and, therefore, that the ACC's Petition should be denied with regard to such services.[94]

35. BAMMC, CTIA, GTE, Mohave, the Rural Cellular Association, and US West New Vector contend, on the other hand, that it would be unfair to permit regulation of cellular services but not non-cellular services.[95] These commenters assert that differential regulation of different services would be inconsistent with the concept of regulatory parity, and could permit non-cellular service providers to gain a competitive edge over cellular service providers.[96]

**b. Discussion**

36. The OBRA provides that a state must have been exercising rate regulation authority as of June 1, 1993, in order to petition this Commission under Section 332 for continuance of that authority.[97] Arizona apparently deregulated common carrier mobile services other than cellular services in 1987,[98] based largely on its conclusion that non-cellular CMRS market conditions do not warrant regulation. Thus, Arizona's Petition must be denied with regard to such services because the State has not met the threshold statutory filing requirement. In any event, Arizona has not met the statutory standard for granting a petition on its merits. The Arizona Petition presents no evidence that market conditions concerning non-cellular CMRS fail to adequately protect consumers against unjust, unreasonable, or unreasonably discriminatory rates for such services.

37. Arizona's failure to demonstrate that rate regulation of non-cellular CMRS is warranted does not preclude us from granting the ACC authority to rate regulate cellular services. We have determined in other proceedings that, while regulatory parity is an important policy that can yield important pro-competitive and pro-consumer benefits when appropriately applied, parity for its own sake is not required by any provision of the Act.[99] Indeed, the Act allows us to adopt a flexible regulatory scheme that treats certain CMRS in a streamlined fashion.[100] Congress recognized that market conditions might warrant differential regulatory treatment of CMRS, and it explicitly granted us the authority to forbear from applying certain provisions of the Act.[101] That Congress intended such forbearance might be exercised selectively is not in doubt. As the OBRA Conference Report states in explaining our forbearance authority:[102]

> The purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.

Nothing in the record of this proceeding demonstrates that Congress intended to deny states similar flexibility with regard to the exercise of their CMRS regulatory authority.

**2. Cellular Services**

**a. Universal Service**

**(1) Comments**

38. Arizona states that it is contemplating streamlining and expediting its regulation governing competitive telecommunications services and companies. To this end, the ACC asserts that it has been examining alternative regulatory frameworks to govern the telecommunications industry. The ACC expects that the standards and rules that it adopts based on this analysis will facilitate ease of market entry and exit and will allow greater pricing flexibility. It also expects to address preservation of universal service in the increasingly competitive telecommunications marketplace.[103]

39. The ACC asserts that one factor contributing to the erosion of local exchange carriers' revenues is the increasing substitution of cellular service for basic land line ser-

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[90] *Id.* at 9-10, 12-13.

[91] *Id.* (also asserting that new competitors do not have luxury of spreading costs associated with regulatory compliance across an established customer base, and therefore should be permitted maximum flexibility).

[92] *Id.* at 9-10.

[93] PageNet Comments at 1.

[94] PCIA Opposition at i, 8-10 & n.21, 16-17.

[95] BAMMC Opposition at 7-8; CTIA Reply Comments at 2; GTE Reply at 3-10; Mohave Opposition at i, 1-2, 9-10; Rural Cellular Association Comments at 2-4 & n.2; US West New Vector Opposition at 3-5.

[96] *See, e.g.*, Rural Cellular Association Comments at 2-4; GTE Reply at iv; Mohave Opposition at 1-2.

[97] *See* 47 U.S.C. § 332(c)(3).

[98] *See* ACC Decision No. 56314 (Jan. 12, 1989) (maintaining regulation of cellular carriers), Arizona Petition App. 1 at 3, 5, 9, *citing* ACC Decision No. 55733 (Jul. 2, 1987) (deregulating most common carrier mobile services); *see also* US West New Vector Comments at 4.

[99] *See* Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 9 FCC Rcd 5836, 5858 (1994) (para. 32) (*Craig O. McCaw), appeal pending on other grounds sub nom.* BellSouth Corp. v. FCC, D.C. Cir. No. 94-639, filed Sept. 23, 1994; *see generally* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 7988 (1994).

[100] *See CMRS Second Report and Order*, 9 FCC Rcd at 1463.

[101] Section 332(c)(1)(A) provides that the Commission may determine that any provision of Title II may be specified as "inapplicable to [any] service or person" otherwise treated as a common carrier. 47 U.S.C. § 332(c)(1)(A).

[102] H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 491 ("Conference Report"). The Conference Report further provides that "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section." *Id.*

[103] Arizona Petition at 5-6.

vice. Increasing competition, Arizona claims, thus threatens wireline telephone companies' ability to continue providing basic telephone service at reasonable rates. According to the ACC, industry participants have suggested that it should therefore require all telecommunications service providers, including cellular, to help fund universal service. The ACC says that it is likely that a universal service funding mechanism will be implemented through the rate structures of intrastate providers. Therefore, Arizona asserts, Commission preemption of state rate regulatory authority over CMRS will jeopardize the ACC's ability to ensure that universal service objectives are attained. If state rate regulation is preempted, the ACC believes that there will be no practicable means for it to require that all telecommunications service providers make equitable contributions to universal service funding.[104]

40. BAMMC notes that the Budget Act permits states to impose requirements "necessary to ensure the universal availability of telecommunications service at affordable rates" where CMRS is a substitute for wireline service for a substantial portion of the customers within the state.[105] Regardless of rate regulation, BAMMC asserts, a state may require carriers to contribute to universal service funds as long as the obligations are evenhanded.[106] Mohave agrees that the state can require universal service fund payments under Section 332 without rate regulation.[107]

**(2) Discussion**

41. The Arizona Commission's concern centers around its intent to exact universal service funding from wireless telecommunications providers by regulating the rates of intrastate service providers. In this regard, the statute provides that:

> Nothing in this subparagraph [preempting State rate regulation of CMRS] shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

47 U.S.C. § 332(c)(3). Since the statute permits a state to institute universal service requirements under appropriate circumstances notwithstanding the general statutory proscription of CMRS rate regulation, it is not reasonable to conclude that Congress contemplated that a state might demonstrate a need for rate regulation by arguing that such authority is required to ensure universal service. We reject Arizona's attempt to do so here.

**b. Market Conditions**

**(1) Comments**

42. Arizona contends that market conditions for CMRS fail to protect subscribers adequately from unjust and unreasonable rates. Arizona asserts first that the potential for monopoly abuses remains strong in the state, and notes that in two of its six Rural Service Areas (RSAs), although two cellular carriers provide cellular roaming service, only the wireline licensee provides basic cellular service through retail affiliates.[108] (Arizona has two MSAs and six RSAs). Thus, the ACC states, there is no effective competition in these RSAs, especially at the retail level.[109] In addition, Arizona emphasizes that the sole operating retailer in each of these two market areas is affiliated with the wireline licensee, which has the advantage of existing network and interconnection facilities and an incumbent customer base.[110] Thus, Arizona asserts, effective competition does not exist in these areas.[111]

43. The ACC also asserts that barriers to entry will arise in an unregulated market where the dominant provider exercises monopoly power.[112] The state asserts that the potential for discriminatory activity, such as favoring an affiliated retailer or raising other entry barriers to non-affiliates, may be especially acute in less populated states such as Arizona.[113] The ACC notes that in all six of the Arizona RSAs, the wholesalers' only retail customers are their own retail affiliates.[114]

44. Arizona also describes several allegedly anticompetitive activities that it has deterred in order to provide for a competitive market and ensure just and reasonable rates for consumers. First, it discusses a tariff provision on roaming that allegedly preferred the affiliated retailer over non-affiliates.[115] Second, it states that it has prevented cellular carriers from implementing "calling party pays" service, which would require local wireline customers to pay for calls to cellular telephones.[116] Finally, Arizona asserts that carriers have attempted to establish excessively large number blocks for resale.[117]

45. In response to Arizona's claims of a lack of competition for cellular service at the retail level, carriers assert that such arguments are irrelevant even if true. For example, BAMMC argues that the lack of competition among retailers is irrelevant because Arizona regulates only wholesale rates.[118] Sharon Megdal, economist and a former Commissioner of the ACC, asserts on behalf of BAMMC that cellular providers set wholesale prices according to general market conditions. Retail rates, Megdal asserts, are set by retail market conditions.[119] BAMMC argues that wholesale rate regulation does not help end users, and points out that rates in RSA AZ21 are similar to those in other RSAs.[120] Mohave contends that in fact there are two cellular carriers

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104 *Id.* at 7-8.
105 BAMMC Opposition at 7 (*citing* 47 U.S.C. § 332(c)(3)).
106 BAMMC Opposition at 7.
107 Mohave Opposition at 4, 16; *see also* Century Cellunet Comments at 5; US West Opposition at 16.
108 Arizona Petition at 15.
109 *Id.*
110 *Id.* at 15.
111 *Id.*
112 *Id.* at 17-18.
113 *Id.* at 15.
114 *Id.* at 16.
115 *See id.* at 16.
116 *Id.* at 14.
117 *Id.* at 18-19.
118 BAMMC asserts that wholesale rate regulation does not protect end users. *See* BAMMC Opposition at 9 & App. A.
119 BAMMC App. A (Megdal Affidavit).
120 BAMMC Opposition at 22 n.10.

providing basic cellular and roaming services in RSA 1, which is one of the markets where Arizona asserted only one provider offers basic cellular service.[121] Furthermore, Mohave and others argue that competition with cellular in such areas is provided by SMR and paging service providers.[122]

46. BAMMC argues that Arizona's claim of ineffective competition must fail because it is based in part on the existence of the duopoly cellular licensing structure, and such structure is the same in Arizona as in any other state.[123] Economist Stanley Besen, on behalf of GTE, asserts that competition occurs within the duopoly cellular market framework,[124] and that competition between cellular operators is, in fact, vigorous.[125]

47. Regarding the alleged advantage of wireline-affiliated cellular carriers over their competitors, BAMMC asserts that there is no wireline advantage in Arizona.[126] According to BAMMC, RSAs 1 and 2 have two operating carriers, although only one of those carriers offers local service. In four out of the six RSAs, the non-wireline carrier was certificated first. At any rate, the carrier states, the B Block provider's affiliation with a wireline carrier is a nationwide phenomenon.[127] Megdal contends on behalf of BAMMC that continued rate regulation of wholesale cellular services in Arizona is not warranted because market forces will discipline the pricing behavior of both wireline and non-wireline cellular providers.[128] US West New Vector asserts that in every cellular service area in Arizona, the non-wireline carrier has coverage generally equal to and in some cases greater than the wireline carrier. Moreover, US West New Vector argues, annual reports submitted to the ACC document that non-wireline carriers enjoy a sizable market presence in each Arizona cellular serving area.[129]

48. With respect to the ACC's allegations regarding barriers to entry and favoritism of affiliated retailers, Megdal asserts that because Commission rules prohibit discrimination against resellers, discontinuing regulation would not leave resellers unprotected from unjust and unreasonable rates.[130] Besen contends on behalf of GTE that, with rapid technological innovation, there may be gains from aggressive pricing. Newcomers to an industry have strong incentives to compete aggressively to attract market shares from existing firms, Besen states. Aggressive pricing can be expected from PCS entrants as they seek to increase their shares of the mobile services market.[131] Besen also states that CMRS is emerging as a highly dynamic and competitive marketplace, as evidenced by the decline in costs of owning and using cellular phones and the increase in numbers of subscribers.[132]

49. The carriers address individually the state's specific allegations regarding anticompetitive and discriminatory activity. Regarding the roaming tariff provision that allegedly preferred the affiliated retailer over non-affiliates, BAMMC contends that the state provides no proof that the provision was preferential and that the tariff was, at any rate, revised.[133] As for the allegation concerning "calling party pays" service, commenting carriers assert that the lack of notice of potential charges could be remedied through advance notification to wireline customers, and that the issue was addressed years ago between cellular carriers and the wireline telephone company -- companies that the ACC will continue to regulate regardless of the outcome of the instant petition.[134] Finally, addressing resale block sizing, BAMMC contends that the establishment of large minimum resale block sizes was not intended by carriers to disadvantage resale and is, at any rate, irrelevant to consumer prices.[135]

50. The cellular carriers also argue generally that CMRS competition in Arizona is robust and that the ACC has failed to demonstrate any need for rate regulation. For example, US West NV, BAMMC, and CTIA assert generally that the ACC provides no evidence showing that market conditions fail to protect Arizona cellular subscribers from unjust or unreasonable prices.[136] Mohave similarly contends that Arizona fails to present evidence of lack of competition,[137] and Century notes that the Petition itself in fact refers to the increasingly competitive telecommunications market in Arizona.[138] CTIA asserts that state regulation is unnecessary in view of competitive forces in the marketplace.[139]

51. The carriers argue that Arizona rate levels are competitive. CTIA claims that cellular rates in states that regulate are 5 to 15 percent higher than in nonregulating states. It contends that regulation, not lack of competition, may explain higher rates.[140] CTIA also asserts that economic analysis leads to the conclusion that in large, regulated MSAs, prices are higher, penetration is lower, and demand levels are lower.[141] At any rate, Arizona cellular carriers assert that intrastate cellular rates are declining. BAMMC states that over the past year it both increased its discounts and dropped the tariffed maximum rates against which those discounts apply.[142] Besen asserts on behalf of GTE

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121 *Id.* at 3.

122 Mohave Opposition at 6-7 & App. 1 (French Affidavit); BAMMC Opposition App. B; CTIA Opposition at 15-16; Century Cellunet Comments at 4; Rural Cellular Association Reply at 3 & n.2.

123 BAMMC Opposition at 20.

124 GTE Comments App. at 9.

125 GTE Comments App. at 10.

126 BAMMC Opposition App. A, paras. 23-24.

127 *Id.*

128 BAMMC Opposition at 3 n.3 & App. A.

129 US West NewVector Opposition at 7.

130 BAMMC Opposition App. A.

131 GTE Comments App. at 11.-

132 GTE Comments App. at 23.

133 Bell Atlantic Metro Mobile states that it did not try to prefer its affiliates on roaming rates. It asserts that it adopted the selling party's tariffs, always agreed to enter reciprocal agreements with non-affiliates, and eventually changed its tariff voluntarily, to emphasize its intent to offer reciprocal roaming arrangements to all carriers. BAMMC Opposition at 25, 27. Mohave states that the Commission could enforce reciprocity of roaming requirements in the future. Mohave Opposition at 19. We are examining our intrastate enforcement authority in our proceeding in GN Docket No. 93-252.

134 *See* BAMMC Opposition at 24; US West NewVector Comments at 16.

135 BAMMC Opposition at 26.

136 US West NewVector Opposition at 14 n.18; BAMMC Opposition at 24; CTIA Opposition at 2.

137 Mohave Opposition at 1-11.

138 Century Cellunet Comments at 4-5.

139 CTIA Opposition at 10-11 & Hausman Affidavit at 3.

140 *Id.*

141 *Id., citing* Affidavit of Besen, Larner, Murdock (Charles River Associates), ET Docket No. 90-314 (1993).

142 *Id.*

that, between December 1992 and December 1993, the number of cellular subscribers increased almost 50 percent.[143] Also, Besen contends, customers have enjoyed a steady decline in the costs of owning and using cellular phones.[144] The cost of owning a cellular phone in 1991 was only 44 percent of its cost in 1983, Besen asserts. He states that this general pattern of declining real prices also holds for cellular systems owned or controlled by GTE.[145] Mohave asserts that Arizona cellular rates are below national average rates.[146] The national average charge is 39 cents per peak minute, for example, but Mohave's rate is 33 cents per peak minute.[147] US West New Vector asserts that the state has presented no evidence that market conditions fail to protect Arizona cellular subscribers from unjust or unreasonable prices.[148]

52. Commenters generally assert that the cellular industry is competitive whether considered in a vacuum or together with other current and future mobile telecommunications services. BAMMC and other cellular interests contend that the ACC fails to note the increasing development of competitive wireless services in Arizona.[149] BAMMC identifies, for example, 46 paging and 78 SMR service providers in Arizona.[150] Mohave notes that it currently competes with 12 unregulated SMR systems, the A Block cellular licensee, and three neighboring cellular carriers whose service areas extend into Mohave's service area and notes that PCS entry is impending.[151] CTIA asserts that CMRS providers competing with cellular include providers of SMR, wide area SMR, PCS, wireless cable, radio, mobile satellite, BETRS, wireless facsimile, and broadband video services.[152] Century similarly alleges that Arizona's cursory analysis of mobile services competition ignores other services with which cellular increasingly competes, such as SMR, wide area SMR, conventional 2-way radio and PCS.[153] The Rural Cellular Association asserts that cellular licensees are or will be subject to competition from cellular resellers and from providers of SMR services and PCS.[154] NCRA, on the other hand, draws a distinction between current service providers and future competitors. It asserts that the states correctly believe that until effective competition arrives, perhaps in the form of PCS and wide area SMR, continued rate regulation is necessary to restrain the dominating market power of cellular duopolists.[155]

53. CTIA cites a Charles River Associates study finding that wide area SMR and certain PCS applications can be deemed competitive substitutes for cellular.[156] GTE asserts that the ACC erred in not including PCS in its definition of the relevant market. GTE states that PCS will expand competition, which will lead to more options and lower rates for consumers.[157] GTE contends that PCS operators may offer either traditional cellular telephony or newer, value-added services.[158] According to GTE, the CMRS marketplace supports substantial supply-side substitutability, so that all mobile telecommunications licensees can provide the same range of services, and therefore all should be considered in the same antitrust market.[159]

54. GTE notes that the advent of PCS will increase the capacity of the industry by adding 120 MHz of spectrum. Thus, GTE asserts, prices should decline whether or not the incumbent firms are behaving competitively.[160] CTIA contends that the new competition from wide area SMR and PCS will assure cost-based prices for CMRS service.[161] CTIA asserts that in a 1994 court affidavit (not attached), economist Jerry Hausman found that since PCS began operating in the United Kingdom in 1993, prices have dropped by 20 to 33 percent.[162] The current inter-industry churn rate, according to CTIA, is 16 percent, which buttresses the carriers' claims that the industry is competitive.[163] GTE asserts that the cellular industry already occupies a competitive marketplace and industry concentration will decrease greatly with the advent of the use of PCS and wide area SMR technologies.[164] GTE asserts that we are about to enter an era in which the number of firms supplying mobile telecommunications service will more than double, effective industry capacity will increase by more than fourfold, measured industry concentration will decline by more than half and the share of the effective capacity of the industry licensed to each of the two current cellular providers will decline by more than two thirds.[165]

55. In contrast to the cellular carriers, cellular service resellers contend that cellular licensees have market power and exercise it. NCRA notes that the Department of Justice, after conducting extensive investigations into the cellular industry, concluded that cellular exchange markets are not competitive, cellular duopolists have substantial market power and cellular carriers exercise bottleneck control over their licensed facilities.[166] NCRA asserts that the state Petitions are motivated by states' desire to protect consumers from deleterious conditions whose existence was acknowledged by this Commission when it classified cellular carriers as dominant common carriers during the 1980s and reaffirmed that classification last year.[167] NCRA

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143 GTE Comments App. at 6.
144 *Id.*
145 *Id.* at 7.
146 Mohave Opposition at ii, 7, 17, App. 1 (French Affidavit).
147 Mohave Opposition at 17.
148 US West NewVector Opposition at 14 n.18.
149 BAMMC Opposition at 21.
150 BAMMC Opposition App. B.
151 Mohave Opposition at ii, 7, 17. Mohave does not mention whether the SMR systems support wide area operations.
152 CTIA Opposition at 15-16.
153 Century Cellunet Comments at 4.
154 Rural Cellular Association Reply at 3 & n.2. No commenters describe the extent of any cellular resale activity in Arizona.
155 NCRA Comments at 2-3.
156 CTIA Opposition at 17.
157 GTE Comments at 15-17.
158 *Id.* at 3.
159 GTE Comments App. at 14 (Besen paper).
160 *Id.* at 13.
161 CTIA Reply at 5.
162 CTIA Opposition at 19 n.42.
163 *Id.* at 12-13, 20. CTIA explains that "churn" rates reflect customer switching, among cellular providers in the case of "intra-industry" churn, or to other telecommunications services in the case of "inter-industry" churn.
164 GTE Comments App. at 1 (Besen paper).
165 GTE Comments App. at 16-19.
166 NCRA Comments at 3.
167 NCRA Comments at 5.

contends that the FCC should grant the Petitions in order to allow the states to maintain their existing regulatory authority as well as to initiate monitoring proceedings.[168]

**(2) Discussion**

56. Section 332(c)(3) provides that a state petition shall be granted if it "demonstrate[s]" that market conditions for the service at issue fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates.[169] On this record we conclude that Arizona has not made such a demonstration and, accordingly, we deny its Petition.

57. The basis for this conclusion is straightforward. First, unrebutted evidence shows that cellular rates in Arizona are declining. Second, the ACC Petition does not address the direct and fundamental changes to the duopoly cellular market structure that are being realized by PCS and other services, such as wide area SMR. Third, the ACC presents no evidence of systematically collusive or other anticompetitive practices concerning the provision of any CMRS. Fourth, the ACC does not present evidence showing widespread consumer dissatisfaction with CMRS providers in Arizona, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fifth, the ACC fails to present any analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers).[170]

58. Another shortcoming of the ACC's Petition is that it views any evidence of market imperfection as proof of a need for continued rate regulation, while all countervailing evidence is attributed to its regulatory oversight. Even assuming such an argument is reasonable in theory, the ACC has not established that the scrutiny it presently exercises over cellular rates can or does account for the absence of evidence of unjust, unreasonable, or unreasonably discriminatory cellular rates in Arizona. On this record, we cannot conclude that the ACC systematically prescribes cellular rate levels, even maximum rates, or requires conformance with any particular formula for developing rates. Although the state constitution appears to grant the ACC authority to take such actions, and rates apparently are reviewed by the ACC prior to taking effect, the rates appear to be carrier-initiated, and there is little evidence that the ACC routinely alters them as a result of the review process. Given this light-handed exercise of available existing authority, we are not persuaded by Arizona's implicit argument that rates would fall outside the "zone of reasonableness" absent continuation of rate regulation by the ACC.

59 . The evidence cited by the ACC as proof that market conditions are inadequate and that continued rate regulation authority is needed to ensure just and reasonable CMRS rates is not persuasive. The first example provided by the ACC, involving a situation in which it ordered changes to the structure of a cellular tariff upon determining that the tariff as initially proposed unreasonably restricted resale, is not described in detail.[171] However, even assuming the ACC acted in that situation to address a potential problem with a tariff provision, one instance does not establish a pattern of anticompetitive conduct or failed market conditions in Arizona's cellular industry.[172] The second example involved a situation in which the ACC intervened in a matter concerning "calling party pays" customer billing.[173] Under the Communications Act, however, billing practices are considered "other terms and conditions" of CMRS offerings, not rates, and the ACC retains authority to regulate such practices. Regulatory activity concerning such practices is not justification for continued rate regulation authority.

60. The cellular carriers provide plausible rebuttals to other specific actions Arizona asserts represent anticompetitive activity,[174] and we cannot conclude that these isolated incidents constitute a pattern of anticompetitive practices that might warrant continued state rate regulation. Indeed, the ACC does not buttress its allegations in this regard with affidavits of persons with knowledge of the incidents it describes,[175] nor does it attach its decision rejecting the roaming tariff provision, or other evidence that might lend evidentiary value to its allegations or show actual anticompetitive intent on the part of the carriers. For these reasons and the reasons stated above, we deny Arizona's Petition.

**c. Cellular as a Replacement for Landline Telephone Exchange Service**

61. Section 332(c)(3)(A) of the Communications Act provides that states may retain rate regulation authority by making one of two alternative demonstrations. As discussed above, the first is that CMRS market conditions fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates. The second is that "such market conditions exist *and* such service is a replacement for landline telephone exchange service for a substantial portion of the telephone land line exchange service" within a State.[176] Arizona argues that CMRS should be regarded as an essential service, replacing landline service, from two perspectives: (1) as a substitute for traditional, basic landline telephone service; and (2) as a connecting link to the landline network for the purpose of mobile communications.[177] Thus, although Arizona does not assert that its Petition is filed pursuant to the second, alternative prong of Section 332(c)(3)(A), as a courtesy to the ACC we will consider its filing in accordance with that statutory subsection.

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[168] NCRA Comments at 6.

[169] *See* 47 U.S.C. § 332(c)(3).

[170] An important indicator of market failure, in our view, would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price. No such demonstration exists on this record.

[171] *See* Arizona Petition at 13.

[172] Moreover, unreasonable restrictions on the resale of cellular service violate this Commission's cellular resale policies. *See* 47 C.F.R. § 22.901(e). Thus, our complaint procedures were (and are) available to address any such concerns. *See Cellular Communications Systems*, 86 FCC 2d at 510-11; *Cellular Resale Order*, 7 FCC Rcd at 4006; Continental Mobile Tel. Co. v. Chicago SMSA Ltd. Partnership, 9 FCC Rcd at 1583-84 (1994).

[173] *See* Arizona Petition at 14.

[174] *See* BAMMC Opposition at 9, 24, 25; US West NewVector Comments at 16.

[175] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505 (requiring that such allegations be supported by affidavit of a person with knowledge).

[176] 47 U.S.C. § 332(c)(3)(A)(ii) (emphasis supplied).

[177] Arizona Petition at 19.

**(1) Comments**

62. The ACC notes that six of the eight cellular service markets in Arizona are RSAs. It asserts that many rural households have gone without telephone service due to the costs of extending cable facilities, and states that cellular has provided a substitute for basic telephone service in those areas.[178] Arizona therefore contends that it has a compelling public interest in ensuring that cellular mobile radio services are provided at reasonable rates, and under reasonable terms and conditions.[179] Particularly in rural areas, it believes, these objectives cannot be achieved without regulation.[180]

63. Second, discussing the role of cellular in providing connections to the landline network, the ACC states that cellular technology has made commonplace the ability of travelers to connect to landlines, and that many aspects of commerce, safety and personal communications therefore now depend on access to the cellular network at reasonable prices and under reasonable terms and conditions.[181] Arizona asserts that the reasonableness of these aspects of interconnection cannot be guaranteed without regulation.[182]

64. Commenters generally assert that Arizona has failed to meet its burden with regard to the demonstration required under Section 332(c)(3)(A)(ii). For example, Bell Atlantic and Mohave state that the ACC has not offered evidence or attempted to show that cellular service has ever replaced wireline service in any part of the State, much less for the requisite "substantial portion" of the state's residents.[183] In the RSA that it serves, Mohave asserts, no rural customers are served at home by a cellular system rather than the landline network.[184] BAMMC argues that Arizona is not the only state that may have low wireline penetration levels. BAMMC and US West NewVector note that 94.1 percent of the population in Arizona has telephones, as compared to 93.9 percent of the population nationwide.[185] Bell Atlantic asserts that if cellular is the only choice in some RSAs, the ACC should have explained how it would apply regulation there and determine when it is no longer necessary. It contends that the ACC should not seek to subject the entire cellular industry in Arizona to regulation if it is warranted only in portions of the state.[186]

**(2) Discussion**

65. Section 332(c)(3)(A)(ii) provides a two-part test for states seeking to continue CMRS rate regulation. Under the first part, a state must demonstrate that the "market conditions" delineated in Section 332(c)(3)(A)(i) exist (*i.e.*, market conditions fail to protect consumers adequately against unjust, unreasonable, or unreasonably discriminatory rates). Under the second part, a state must demonstrate that CMRS is a replacement for landline telephone exchange service in a substantial portion of that state. In the *CMRS Second Report and Order* we concluded that the plain language of the statute requires a state to satisfy both parts of the test in order to secure CMRS rate regulation authority.[187] The Pennsylvania Public Utility Commission ("Pennsylvania PUC") has sought reconsideration of that determination, based principally on an argument that it renders Section 332(c)(3)(A)(ii) superfluous.[188] We address the Pennsylvania PUC's request here in order to provide guidance to all states that might seek CMRS rate authority under Section 332(c)(3)(A)(ii), and to resolve Arizona's pending Petition. For the reasons discussed in the following paragraph, we hereby grant the Pennsylvania PUC's reconsideration petition with respect to this issue.

66. We agree with the Pennsylvania PUC that a literal reading of Section 332(c)(3)(A)(ii) would make it superfluous because any state that could establish the existence of failed market conditions would be entitled to grant of its petition under Section 332(c)(3)(A)(i). Since such a reading yields an absurd result, we reject it. That determination, however, does not require us to write out of the statute the language in Section 332(c)(3)(A)(ii) requiring a demonstration that market conditions fail to protect subscribers adequately against unjust, unreasonable, and unreasonably discriminatory rates. Rather, we conclude that by requiring a demonstration of "such market conditions" *and* a showing that CMRS is a replacement for landline telephone exchange service, Congress merely intended to remove the presumption embodied in Section 332(c)(3)(A)(i) that extant market forces are to be preferred over regulation as a means of ensuring just, reasonable, and non-discriminatory CMRS rates. Put another way, where CMRS is the only available exchange telephone service, we construe Section 332(c)(3)(A)(ii) to mean that Congress' interest in promoting universal telephone service outweighs its interest in permitting the market for CMRS to develop in the first instance unfettered by regulation.[189] As a practical matter, all this means is that concerns about anticompetitive conditions in the market for CMRS will be given greater weight where a state can show that such service is the sole means of obtaining telephone exchange service in a substantial portion of a state.

67. Arizona has not made an adequate demonstration under this standard. The ACC has failed to adduce evidence that identifies either: (1) the number of individuals

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178 *Id.* at 19-20.
179 *Id.* at 20.
180 *Id.*
181 *Id.*
182 *Id.*
183 BAMMC Opposition at 20; Mohave Comments at 5, 16, 17. BAMMC also contends that it would be difficult for carriers to identify scattered rural customers or charge them prices at variance from other customers. BAMMC Opposition at 19, App. A para. 21.
184 Mohave Comments at 5, 8. Mohave notes that some of the customers in this RSA, Arizona 1, are served by BETRS systems rather than the landline network, but the BETRS is not a commercial mobile radio service, and thus does not meet the statutory test. *Id., citing CMRS Second Report and Order*, 9 FCC Rcd at 1425.
185 BAMMC Opposition at 18-19; US West NewVector Opposition at 9. BAMMC also states that over 80 percent of the State's inhabitants reside in the two MSAs. BAMMC Opposition App. A (Megdal Affidavit). US West NewVector notes that landline penetration has grown, and attributes this growth at least in part to the rates of wireline service, which are still low in comparison to cellular rates. US West NewVector Opposition at 9.
186 BAMMC App. A (Megdal Affidavit).
187 *CMRS Second Report and Order*, 9 FCC Rcd at 1505.
188 *See* Petition for Reconsideration of the Pennsylvania Public Utility Commission, CC Docket No. 93-252, filed May 19, 1994.
189 *See* Conference Report at 493: "[T]he Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service."

in that State for whom CMRS is the only available telephone exchange service; or (2) whether CMRS service is available to such consumers at just, reasonable and nondiscriminatory rates. Indeed, the record evidence tends to run counter to the type of showing that is required under Section 332(c)(3)(A)(ii). For example, Arizona appended to its Petition testimony offered by an employee of the state's largest landline exchange service provider to the effect that "there is little evidence that cellular service is actually replacing traditional wireline service. . . ."[190] Moreover, the ACC concedes that, to the extent areas of the state currently lack landline telephone exchange service, this is due to the "extreme and prohibitive costs involved in extending cable facilities."[191] Under such circumstances, it is reasonable to conclude that the question whether CMRS rates in such areas are just, reasonable and not unreasonably discriminatory should be measured against the cost of extending facilities to such areas. The ACC has failed to provide any evidence in this regard. Against this background, we conclude that the ACC has failed to demonstrate circumstances that might warrant granting its petition under Section 332(c)(3)(A)(ii).

68. Arizona also fails to demonstrate that market conditions are unreasonable in the two RSAs in that state where only one cellular licensee apparently provides regular (non-roaming) service. Essentially, Arizona is arguing that conditions in single-provider markets are unreasonable *per se*. We do not agree. The bare fact that a market is served by a single entity does not necessarily say very much about conditions in that market when, as here, competitive entry not only is feasible but appears to be relatively easy.[192] As Arizona concedes, the other licensee in each of the two RSAs in question already provides roaming service there. Nothing in the record suggests that those licensees would confront significant barriers to entering the market to provide regular (non-roaming) service. Thus, at least in theory, it is readily conceivable that only one licensee in these RSAs offers regular service because the other licensee believes it could not offer such service profitably.

### B. *Entry Regulation*

69. Arizona currently regulates entry by requiring a cellular service applicant to obtain a Certificate of Public Convenience and Necessity prior to instituting service.[193] Arizona routinely requires cellular applicants to submit information including: (1) delineation of the initial service territory of each cellular wholesale provider; (2) notice of any subsequent changes in service area; and (3) interconnection agreements.[194] In addition, it has upon occasion imposed conditions on service provision as warranted by unique circumstances. For example, in one case the ACC required the filing of descriptions of the type of interconnection to the wireline local exchange network, and in another situation it imposed conditions to protect against cross-subsidization by the wireline service provider.[195] In its Petition, Arizona seeks to retain its authority to regulate CMRS entry as well as rates.[196] It asserts that its entry regulation has worked to benefit Arizona subscribers, for example by ensuring that customers have information about prices and service conditions before making purchase decisions.[197]

#### 1. Comments

70. Bell Atlantic, Century, Mohave, and US West NewVector assert that the State's request to continue entry regulation is invalid because Congress has preempted the states entirely from entry regulation.[198] BAMMC notes that Arizona still has not eliminated its certification requirement, and states that the certification requirement and the Arizona tariff review process are preventing Bell Atlantic from offering service in the AZ-2 RSA, even though this Commission authorized BAMMC to acquire the A-side license from the current licensee in that area in June 1994.[199] Mohave asserts that the state has never denied certification to an applicant that had properly obtained FCC licenses and authority.[200]

#### 2. Discussion

71. We agree with the commenters' assertions. Section 332 of the Communications Act clearly preempts state regulation of CMRS entry:[201]

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

This Section took effect on August 10, 1994.[202] The statute specifically provides opportunities for states to submit petitions for authority to institute or retain regulation of CMRS rates.[203] It does not provide any opportunity for states to petition for authority to regulate CMRS entry. We interpret this specific opportunity for state regulation of rates, coupled with silence regarding an opportunity to retain regulatory authority over entry, as a clear preemption of continued state regulation of CMRS entry. Accordingly, Arizona's Petition, insofar as it seeks to preclude CMRS providers from entering the marketplace, is denied. Thus, regarding Bell Atlantic's assertion that Arizona is holding up BAMMC's initiation of service provision to RSA AZ-2, we note that any state entry requirements have been unauthorized as of August 10, 1993.

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190 *See* Arizona Petition at App. testimony of D. Mason, US West Communications, Inc.
191 *Id.* at 20.
192 *See* J. Tirole, The Theory of Industrial Organization 305 (1988).
193 Arizona Petition at 8-9.
194 Arizona Petition at 9-12 & App. 4.
195 *Id.* at 12-13.
196 *See id.* at 1, 11-13, 22.9
197 *Id.* at 11.
198 *See* BAMMC Opposition at 6-7; Century Cellunet Comments at 1; Mohave Comments at 10-11; US West NewVector Opposition at 11.
199 BAMMC Opposition at 7 n.5 & 22-23.
200 Mohave Opposition at 12.
201 47 U.S.C. § 332(c)(3)(A).
202 *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(c)(2)(A), 107 Stat. 312, 396 (1993).
203 47 U.S.C. § 332(c)(3)(A), (B).

## VI. REGULATION OF OTHER TERMS AND CONDITIONS

72. Prior to OBRA, Section 332 prohibited the states from imposing "rate ... regulation" upon certain wireless telecommunications carriers.[204] This prohibition was construed broadly to preclude almost all state regulatory activity.[205] As revised by OBRA, Section 332(c)(3) now prohibits states from regulating "the rates charged" for CMRS, but it expressly reserves to them the authority to regulate the "other terms and conditions of commercial mobile services." Although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the ACC is entitled to continue, despite our denial of its Petition.

73. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:[206]

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

74. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the ACC Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

75. First, although the ACC may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.[207] In consequence, it is conceivable that matters might arise under state complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit the ACC to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

76. Second, under the same logic, we also conclude generally that several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the public utility commission, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe Arizona retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state. We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of Arizona regulatory practice at issue.

## VII. ORDERING CLAUSES

77. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), IT IS ORDERED that the Petition of the Arizona Corporation Commission To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services IS DENIED for the reasons set forth above.

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[204] The statute provided in relevant part that "[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . . ." 47 U.S.C. § 332(c)(3) (prior to revisions enacted by OBRA).

[205] *See, e.g.*, Telocator Network of America v. FCC (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission's interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). *See also, e.g.*, American Teltronix (Station WNHM552), 3 FCC Rcd 5347 (1988)("Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier."), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990)(note omitted) ("state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute .... [A]ccompanying legislative history reveals that Congress recognized the Commission's broad discretion to dictate which land mobile systems are to be regulated as private."). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission's Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 (para. 24 n.19) (1990):

> If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

[206] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261.

[207] *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person "complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a) (emphasis added).

78. IT IS FURTHER ORDERED, that the Petition for Reconsideration of the Second Report and Order in the proceeding captioned Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994), filed by the Pennsylvania Public Utility Commission, IS GRANTED to the extent set forth above.

79. IT IS FURTHER ORDERED, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order SHALL BE FILED within thirty days of the day after the day on which public notice of this action is given.[208]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**APPENDIX A**

**PR Docket No. 94-104 (Arizona)**

***Parties Filing Comments or Replies***

American Mobile Telecommunications Association (AMTA)
AMSC Subsidiary Corporation (AMSC)
Bell Atlantic Metro Mobile Companies (BAMMC)
Cellular Telecommunications Industry Association (CTIA)
Century Cellunet, Inc. (Century or CCI)
E.F. Johnson Co. (E.F. Johnson)
GTE Services Corp. (GTE)
Mobile Telecom. Technologies Corp. (MTel)
Mohave Cellular Ltd. Partnership (Mohave)
National Cellular Resellers Assn. (NCRA)
Nextel Communications, Inc. (Nextel)
PageMart, Inc. (PageMart)
Paging Network, Inc. (PageNet)
Personal Communications Industry Assn. (PCIA)
Pittencrieff Communications, Inc. (Pittencrieff)
Rural Cellular Association
US WEST New Vector (US West or US West NV)

[208] Although we assigned the ACC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 94-109**

In the Matter of

Petition of the State of Ohio for Authority
To Continue To Regulate Commercial Mobile
Radio Services

**REPORT AND ORDER**

**Adopted: May 4, 1995; Released: May 19, 1995**

By the Commission:

## I. INTRODUCTION

1. On August 9, 1994, the Public Utilities Commission of Ohio (hereinafter "Ohio" or "OPUC"), on behalf of that state, petitioned us to retain state regulatory authority over the rates for intrastate commercial mobile radio services (CMRS").[1] By this action, we deny the petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

## II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.[2] Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;[3] (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;[4] and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.[5]

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of CMRS.[6] As an exception to this general rule, Congress also provided that, if a State had "any regulation" concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."[7]

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state seeking to retain regulatory authority must "clear substantial hurdles" in demonstrating that continued regulation is warranted.[8] We also determined that the nature of a state's burden of proof is delineated generally by the statute itself. Specifically, we found that:[9]

> [I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [*sic*] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be grounded on demonstrable evidence.[10] In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be pertinent and helpful to our consideration of a state peti-

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[1] Ohio, Statement of the Public Utilities Commission of Ohio's Intention To Preserve its Right for Future Rate and Market Entry Regulation of Commercial Mobile Services, at 1 (Aug. 9, 1994) (hereinafter "Ohio Petition"). A list of parties that filed pleadings in this proceeding appears at Appendix A.

[2] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

[3] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (1994) (*CMRS Second Report and Order*), *reconsideration pending.*

[4] National Telecommunications and Information Administration Organization Act, § 113(b)(1).

[5] The competitive bidding methodology is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays ...." 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

[6] *See* 47 U.S.C. § 332(c)(3)(A).

[7] *See* 47 U.S.C. § 332(c)(3)(B).

[8] *See CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[9] *Id.*, 9 FCC Rcd at 1421.

[10] *Id.*, 9 FCC Rcd at 1504.

tion.[11] Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.[12] We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.[13] In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising Federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."[14] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

## III. DECISIONAL FRAMEWORK

6. In order to prevail on the merits, the OPUC must sustain its statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[15] A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties' debate in this record. As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state's petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service[16] have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

7. Since the Budget Act does not explicitly construe or elaborate on the phrase "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory," we look to the "design of the statute as a whole and its object and policy" to give that phrase meaning.[17] We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also speak of just and reasonable rates.[18] We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive market operations.[19] The more formal description, however, is whether rates fall within a "zone of reasonableness" that is bounded at one end by the "investor interest in maintaining financial integrity and access to capital markets" and at the other by the "consumer interest in being charged non-exploitative rates."[20] Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by reference to carriers' costs and earnings,[21] but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.[22] These principles

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[11] 47 C.F.R. § 20.13.

[12] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505.

[13] Under *Louisiana PSC*, the Commission may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana Pub. Ser. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal policy. *See* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); National Ass'n of Reg. Util. Comm'ners v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[14] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

[15] 47 U.S.C. § 332(c)(3).

[16] Although the provisions of Section 332(c)(3) of the Act apply to rate or entry regulation in the case of any commercial mobile radio service provider, the OPUC Petition is oriented to the provision of cellular service.

[17] *See* Crandon v. United States, 494 U.S. 152, 157 (1990); McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[18] *See* 47 U.S.C. § 201; *see also* 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

[19] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886, 2889-2900 (1989); *see also* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.y

[20] *See, e.g.*, FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988); *see also* FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

[21] *See* FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs.") (citation omitted); *see also* Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05, *reh'g denied*, Bass v. FPC, 392 U.S. 917 (1968) (upholding ratemaking based upon area-wide average costs).

[22] *See, e.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

> Mobil's argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional "non-cost" incentives on the evidence of a need for increased supplies.

*Id.* at 316. *See also* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); Public Service Comm'n of New York v. FERC, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

define basic components of a state's demonstration under Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a "zone of reasonableness," which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

8. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: "no State ... shall have any authority to regulate" CMRS rates.[23] As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) ("State Preemption"), express an unambiguous congressional intent to foreclose state regulation in the first instance.[24] Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation,[25] and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.[26]

9. Unlike some of the opponents of the OPUC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;[27] (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed "rapidly" through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal of stimulating economic opportunity and competition[28] and (3) in contemplation of the deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.[29]

10. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving,[30] and it provided the resources *e.g.*, additional spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.[31] Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment – rather than burdening entrepreneurial activities – and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.[32]

11. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of "market conditions" in the context of Section 332(c)(3) necessarily is governed by that framework.

12. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that Ohio or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Commission established the two-carrier cellular market structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities.[33] Other Federal agencies have taken similar

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[23] 47 U.S.C. § 332(c)(3).

[24] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[25] 47 U.S.C. § 332(c)(1)(A).

[26] 47 U.S.C. § 332(c)(1)(C).

[27] OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

[28] *See* OBRA § 6002(a), amending Section 309 of the Communications Act.

[29] *See* 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

[30] The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. *See* Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international allocations decision making fora that recognized and permitted the use of such spectrum for PCS and other emerging technologies on a global scale. *See* Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. *See* OBRA § 6002(d)(2)(B).

[31] *See CMRS Second Report and Order*, 9 FCC Rcd at 1421; *see also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

[32] *Id.*

[33] *See, e.g.*, Cellular Communications Systems, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571

positions.[34] One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that "[w]hile GAO found no evidence of anticompetitive or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."[35] It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly prohibited state regulation of CMRS.[36] Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.[37]

13. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.[38] For example, we have attempted to heighten cellular competition at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between the two licensees in each local market.[39] We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.[40] Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

14. The framework of our CMRS regulatory policy -- moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by regulating existing licensees -- aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.[41] As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,[42] not a policy that is balkanized state-by-state.

15. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work. With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:[43]

> [i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

16. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impos-

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(1982); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

[34] *See* Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 ("[T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]"); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 ("[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market."), 10-12.

[35] United States General Accounting Office, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," GAO/RCED-92-220 (July 1992) (GAO Report).

[36] *Cf.* Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord* Miles v. Apex Marine Corporation, 489 U.S. 19 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Minneapolis & St. Louis Railway Co. v. United States, 361 U.S. 173 (1959).

[37] *Cf.* McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

[38] *See, e.g.*, GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. *See* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

[39] *See Cellular Resale Order*, 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry*), Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

[40] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

[41] If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

[42] See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

> [B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

[43] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

sible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that Congress would have established two separate statutory procedures -- one to govern our forbearance, and another to govern states' petitions,[44] -- if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

17. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,[45] and such conditions can produce good results for consumers.[46] In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

18. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to perform a Structure-Conduct-Performance ("SCP") analysis,[47] which is a standard paradigm of modern industrial organization analysis.[48] This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the number of competitors, the cost structure, and the degree of integration with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry structure and allows us to determine whether and how consumer interests are being served by such activity.

19. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce "specific allegations of fact," to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding "anticompetitive or discriminatory practices or behavior by commercial mobile radio service providers."[49] We also requested "[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces," and we indicated that we would consider such evidence "especially probative."[50]

20. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,[51] and "an assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state."[52] We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.[53] In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on "trends" in each commercial radio provider's rates and customer base[54] and on "opportunities for new providers to enter into the provision of competing services" as well as "an analysis of any barriers to such entry."[55] In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they see fit,[56] the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

21. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors

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[44] *See* 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

[45] In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. *See* D. Carlton & J. Perloff, Modern Industrial Organization 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

[46] *See, e.g.*, W. Baumol, J. Panzar & R. Willig, Contestable Markets and the Theory of Industry Structure 15-46 (1982).

[47] Section 20.13(a)(1) requires states to include "demonstrative evidence" establishing failed market conditions. *See* 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. *See* 47 C.F.R. § 20.13(a)(2)(vi).

[48] *See, e.g.*, F. Scherer & D. Ross, Industrial Market Structure and Economic Performance, 4-7 (3d ed. 1990) ("Scherer and Ross"); D. Carlton & J. Perloff, Modern Industrial Organization, chs. 1, 9 (2d ed. 1994); J. Tirole, The Theory of Industrial Organization 1-3 (1988).

[49] 47 C.F.R. § 20.13(a)(2)(vi).

[50] 47 C.F.R. § 20.13(a)(2)(vii).

[51] 47 C.F.R. § 20.13(a)(2)(i) and (ii).

[52] 47 C.F.R. § 20.13(a)(2)(iv).

[53] 47 C.F.R. § 20.13(a)(2)(viii).

[54] 47 C.F.R. § 20.13(a)(2)(ii) and (iii).

[55] 47 C.F.R. § 20.13(a)(2)(v).

[56] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

22. While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.[57] Under the case law potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors,[58] and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in markets encompassing Ohio have committed to pay substantial sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment.

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[57] *See, e.g.*, McCaw Personal Communications, Inc. v. Pacific Telesis Group, 645 F. Supp. 1166, 1174 (N.D. Cal. 1986) ("the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high"), *citing* United States v. Waste Management, Inc., 743 F.2d 976, 982- 83 (2d Cir. 1984). *See also* American Bar Association, I Antitrust Law Developments (Third) 307-11 (1992) and cases cited therein.

[58] *See* FTC v. Owens-Illinois, Inc., 681 F. Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning "the extensive present and future intermaterial competition in the glass and other packaging industries," "[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic"); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992)(*Merger Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: "In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact") (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

## BROADBAND PCS AUCTION RESULTS

| Ohio | | | | | |
|---|---|---|---|---|---|
| **MTA #** | **Freq. Blk.** | **State** | **Market** | **Winning Bidder** | **Winning Bid** |
| M038 | A | Ohio | Columbus | AT&T Wireless PCS Inc. | $22,290,000 |
| M038 | B | Ohio | Columbus | American Portable Telecommunications, Inc. | $22,176,837 |
| M021 | A | Pennsylvania | Pittsburgh | WirelessCo, L.P. | $28,719,362 |
| M021 | B | Pennsylvania | Pittsburgh | American Portable Telecommunications, Inc. | $31,665,837 |
| M018 | A | Ohio | Cincinnati-Dayton | Omnipoint Corporation | $347,518,309 |
| M018 | B | Ohio | Cincinnati-Dayton | WirelessCo, L.P. | $442,712,000 |
| M016 | A | Ohio | Cleveland | Ameritech Wireless Communications, Inc. | $87,000,000 |
| M016 | B | Ohio | Cleveland | AT&T Wireless PCS Inc. | $85,881,000 |
| M010 | A | Maryland | Washington-Baltimore | American Personal Communications, L.P. | $102,343,539[59] |
| M010 | B | Maryland | Washington-Baltimore | AT&T Wireless PCS Inc. | $211,771,000 |
| M005 | A | Michigan | Detroit | AT&T Wireless PCS Inc. | $81,177,000 |
| M005 | B | Michigan | Detroit | WirelessCo, L.P. | $86,107,000 |

[59]This figure represents the amount to be paid by the pioneer's preference licensee, as required by Section 309(j)(13) of the Communications Act. *See* American Personal Communications, Washington-Baltimore MTA #10, Frequency Block A; Cox Cable Communications, Inc., Los-Angeles-San Diego MTA #2, Frequency Block A; Omnipoint Communications, Inc., New York MTA #1, Frequency Block A; For Initial Authorizations in the Broadband Personal Communications Service, Memorandum Opinion and Order, 10 FCC Rcd 1101 (1994).

23. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It *is* happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge that reasonably soon they will face new competition from PCS licensees.[60] The advent of PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.[61] Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantial and pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

24. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

25. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the statutory goal of promoting investment in the cellular infrastructure. In that event, the rates underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

26. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic factors.[62] For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.[63] Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.[64] Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

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[60] *See, e.g.*, Comm. Daily, Apr. 24, 1995, "*Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS*" (report on independent researcher's projection of cellular service rate cuts "up to 40%" over next two years); Comm. Daily, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is $24.99, with additional min. at 29 cents in home county, 99 cents elsewhere"); M. Mills, *Wireless: The Next Generation*, Wash. Post, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal -- Bell Atlantic, NYNEX Plan to Merge Their Mobile and Cellular Divisions as PCS Players Continue Consolidation*, InformationWeek , Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

[61] *See, e.g.*, Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 ("Description of Transaction and Public Interest Statement") at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending;* Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 9 FCC Rcd 5836, 5862-63 (1994)(*Craig O. McCaw*), *appeal pending on other grounds sub nom.* BellSouth Corp. v. FCC, D.C. Cir. No. 94-639, filed Sept. 23, 1994.

[62] *See, e.g.*, J. Tirole, The Theory of Industrial Organization 209-70 (1988).

[63] *Id.* at 239-70.

[64] In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.

27. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to be persuasive. Those demonstrations that are tied most closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

## IV. OHIO PETITION

28. In its petition, Ohio seeks "to preserve its right for future rate and market entry regulation of commercial mobile services." Ohio states that it does not presently set rates or limit market entry of commercial mobile radio service (CMRS) providers, but that it currently "exercises jurisdiction over cellular service providers and radio common carriers."[65] The state explains that this jurisdiction extends to: (1) using its complaint authority to ensure that the rates of a cellular wholesaler are not unduly discriminatory, preferential to affiliates, or anticompetitively set below cost; and (2) reviewing contractual arrangements between regulated utilities, including interconnection and roaming agreements of CMRS providers, to ensure the availability of competitive alternatives.[66] Ohio does not believe that regulation of this nature constitutes rate and entry regulation preempted by Section 332(c).[67] It states that it monitors and identifies market entrants and the economic dynamics of the industry in order to obtain the information necessary to regulate telecommunications matters other than rates and entry, such as infrastructure deployment.[68]

29. Ohio describes its uncertainty as to whether the current two-carrier cellular industry structure, taken together with current and future functional substitutes, "will be sufficient to impose the degree of market discipline necessary to obviate any need for regulation."[69] Accordingly, Ohio seeks to preserve its right to regulate rates, and apparently also seeks some potential future authority over entry.[70] The state asserts that the OPUC "does not presently set rates or limit market entry,"[71] but it notes that its filing is submitted ". . . to preserve Ohio's right to petition the FCC at some point in the future for the purpose of additionally regulating the rate and market entry of commercial mobile radio service providers in the State of Ohio."[72]

30. Many parties argue that Ohio's admission raises the threshold issue of whether it is statutorily qualified to file a petition to continue CMRS rate regulation. Our decision to deny Ohio's petition on the merits, *infra*, renders that argument moot.

## V. CASE ON THE MERITS

### A. *Summary*

31. We deny Ohio's petition to regulate the rates and entry of CMRS providers. Ohio's Petition does not demonstrate, as required under Section 332(c)(3)(A) of the Communications Act, that it was regulating "the rates charged" by any CMRS provider in that state as of June 1, 1993.;[73] In addition, we find that Ohio has failed to meet its statutory burden of showing that market conditions for the service(s) at issue fail to protect subscribers adequately from unjust and unreasonable rates, or unjustly and unreasonably discriminatory rates. Finally, in regard to Ohio's implication that the state may in future request authority to regulate entry into the CMRS marketplace, we note that Section 332(c)(3)(A) of the Act wholly displaces state regulation of CMRS entry.[74]

### B. *Disposition on the Merits*

#### 1. Pleadings of the Parties

32. Ameritech states that Ohio makes no showing that market conditions present a need to regulate cellular services.[75] CTIA, GTE, McCaw, NewPar, Ray's Electronics and Sprint Cellular assert that the Ohio petition fails to meet the statutory standard and the requisite burden of proof, and provides no evidence of market conditions.[76] CTIA notes that a state must present more evidence than a simple desire to regulate CMRS; the statute requires a showing that market conditions are such that rate regulation is necessary to protect against market failure.[77] GTE asserts that Ohio does not provide any evidence addressing market conditions, the OPUC's existing or proposed rate regulation, if any, or why rate regulation is now needed.[78] Indeed, GTE states, Ohio acknowledges that it remains to be seen whether cellular service market conditions will obviate the need for state regulation. In sum, according to GTE, Ohio makes no *prima facie* case that continued state regulation is needed.

33. McCaw adds that rate regulation is unnecessary in light of current and reasonably foreseeable market conditions, and states that the Ohio has provided no evidence that cellular carriers have market power, or that the level of competition in Ohio departs from conditions relied on by the Commission in forbearing from imposing certain Title II requirements in our proceeding implementing the 1993 amendments of Sections 3(n) and 332 of the Communications Act.[79] McCaw also states that, contrary to Ohio's assertion that the quantity of resellers in Ohio reflects the nature of competition, the number and financial condition of cellular resellers is irrelevant to the statutory goal of

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[65] Ohio Petition at 1.
[66] *Id.* at 3.
[67] *Id.* at 2.
[68] *Id.* at 1-4.
[69] Ohio Petition at 1-2, 6. As discussed *infra*, Section 332(c)(3) of the Communications Act preempts state regulation of CMRS market entry and does not provide a method for states to petition to regulate such entry. *See* 47 U.S.C. § 332(c)(3).
[70] Ohio Petition at 1-2, 6.
[71] *Id.* at 1.
[72] *Id.* at 6.
[73] *See* 47 U.S.C. § 332(c)(3)(A).
[74] *See* 47 U.S.C. § 332(c)(3)(A).
[75] Ameritech Comments at 3.
[76] CTIA Comments at 2-3, 6 and Reply at 3-4; GTE Comments at 11-13; McCaw Comments at 3, 11; NewPar Comments at 1-3, 6-7 and Reply at 1-2; Ray's Electronics at ii, 6-7; Sprint Cellular Comments at 5-6.
[77] CTIA Comments at 2, 10.
[78] GTE Comments at 11-13.
[79] McCaw Comments at 3, 11.

protecting subscribers from discriminatory rates.[80] Ohio, McCaw asserts, provides no evidence that facilities-based carriers are pricing wholesale service in a discriminatory manner.[81] Further, McCaw claims, there is no economic justification for Ohio's regulation of wholesales rates.[82] Sprint Cellular adds that Ohio provided no evidence of market conditions in the state.[83]

34. On the other hand, the National Cellular Resellers Association (NCRA) asserts that until effective competition arrives, perhaps in the form of wide-area SMR and PCS, continued rate regulation is necessary to restrain dupolists' power.[84] NCRA argues that a number of Federal agencies have also found little evidence of cellular service market competition, and notes that the Commission has classified cellular as dominant and tentatively concluded that cellular service providers should be subjected to equal access obligations.[85] The NCRA also asserts that existing state regulations are the only means available to protect consumers.[86]

35. McCaw responds that the Federal documents cited by the NCRA have no value in determining whether any particular state has met its burden of proof in justifying current or prospective regulation of cellular markets.[87] New Par adds that the NCRA's comments fail to address the OPUC's material defect of failing to make the requisite statutory showing that continued rate regulation is necessary.[88]

36. In regard to CMRS other than cellular services, AirTouch Paging, PageMart and MTel state that Ohio has not met the burden of showing that the continued regulation of paging entry or rates is justified, and its petition should be denied.[89] AirTouch Paging also asserts that the paging industry is competitive, and is characterized by relatively low barriers to entry, a variety of frequencies, many facilities-based competitors, and healthy price competition.[90] MTel adds that Ohio has not met its burden with regard to narrowband PCS, in that it provided no showing with regard to that highly competitive service which would meet the statutory standard.[91] AMSC states that Ohio petition fails to make a specific showing as to MSS, and does not differentiate its requests regarding providers that are not currently offering service.[92] AMSC urges the Commission to preempt state regulation of the MSS ground segment, based on Ohio's failure to make a contrary showing, and based on past Commission policy of general preemptive action in similar instances.[93] AMTA, describing the high degree of competition among private land mobile systems which have been reclassified as CMRS, opposes any state regulation of the entry or rates of such systems.[94] AMTA asserts that the petition is silent regarding intent to include reclassified private services within its regulatory framework, and the state provides no evidence that market conditions in this segment of the CMRS industry do not adequately protect subscribers.[95] Nextel asserts that no state has demonstrated that regulation of intrastate rates of non-dominant CMRS is necessary to protect subscribers. Rate regulation, Nextel states, would further inhibit the ability of emerging wireless providers to compete with cellular incumbents and would benefit only dominant cellular carriers.[96] Nextel points out that the Commission has recognized that the cellular marketplace is not fully competitive, and has acknowledged that all CMRS providers, other than cellular licensees, currently lack market power. Nextel asserts that these characterizations provide the basis for distinguishing among classes of CMRS providers in preempting state regulation. Continued regulation of cellular service providers may be necessary in order to prevent anticompetitive practices that will stifle development of the wireless market.[97] But the states make no showing that regulation of non-dominants is necessary, nor could they, since wide area SMR and PCS are not duopolists, nor do they command a transmission bottleneck.[98] If the potential future CMRS marketplace, with six different competitors, was the reality now, Nextel asserts, there would be no basis for state regulation at all.[99] PageNet opposes the state petitions to the extent that they seek to regulate non-cellular CMRS, and asserts that the statutory standard has not been met.[100] The Personal Communications Industry Association (PCIA) argues that no states even attempted to justify continued regulation of paging. Thus, state regulation purporting on its face to apply to the highly competitive paging market should be preempted as of August 10, 1994.[101]

**2. Discussion**

37. In order to continue regulation of intrastate cellular rates, Ohio must prove that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[102] Ohio has not satisfied the statutory requirement.

38. Our decision is based in part on the fact that the OPUC itself has not concluded that market conditions fail to protect consumers. Although Ohio states it is not certain whether the evolving CMRS industry structure imposes sufficient market discipline to avoid any need for regula-

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80 *Id.* at 3-4.
81 *Id.*
82 *Id.* at 13 & Exhibit A (Affidavit of economist B. Owen).
83 Sprint Cellular Comments at 6-7.
84 NCRA Comments at 2-3.
85 *Id.* at 3-4.
86 *Id.* at 5-6.
87 McCaw Reply at 5-6.
88 NewPar Reply at 3.
89 AirTouch Paging Comments at ii, 9 and Reply at 1-3; MTel Comments at 1-2; PageMart Reply at 1-2.
90 *Id.* at 8-9; *accord* Personal Communications Industry Association (PCIA) Comments at i,8, 9-10 & n.21, 16-17.
91 MTel Comments at 1-2, 6-8.
92 AMSC Comments at 1-2, *citing* 9 FCC Rcd 1411 (1994).
93 *Id.*
94 AMTA Comments at 1, 6-7; *accord* E.F. Johnson Comments (requesting exemption of "local" SMR and 220 MHz land mobile systems from state rate regulation).
95 *Id.* at 5-7.
96 Nextel Comments at i-ii, 2, 7-9.
97 *Id.* at 9-10, 12-13.
98 *Id.* (also asserting that new competitors do not have luxury of spreading costs associated with regulatory compliance across an established customer base, and therefore should be permitted maximum flexibility).
99 *Id.* at 9-10.
100 PageNet Comments at 1.
101 PCIA Comments at i,8, 9-10 & n.21, 16-17.
102 *See* 47 U.S.C. § 332(c)(3)(A).

tion,[103] the statute requires a *demonstration* that market conditions "fail" to protect subscribers. The OPUC has not provided that demonstration for any CMRS. Indeed, in an order adopted in October 1993, Ohio found "a reasonable probability that [the OPUC's relaxation of cellular regulation] will not adversely affect consumers."[104] No information has been filed in the record of this proceeding that causes us to question the OPUC's own judgment in this regard.

39. There are other bases for our decision. First, the OPUC Petition does not address the direct and fundamental changes to the duopoly cellular market structure that are being realized by PCS and other services, such as wide area SMR. Second, the OPUC presents no evidence of systematically collusive or other anticompetitive practices concerning the provision of any CMRS. Third, the OPUC does not present evidence showing widespread consumer dissatisfaction with CMRS providers in that state, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fourth, the OPUC does not present any analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers).[105] For all these reasons, we deny the OPUC's petition.

## VI. REGULATION OF OTHER TERMS AND CONDITIONS

40. Prior to OBRA, Section 332 prohibited the states from imposing "rate ... regulation" upon certain wireless telecommunications carriers.[106] This prohibition was construed broadly to preclude almost all state regulatory activity.[107] As revised by OBRA, Section 332(c)(3) now prohibits states from regulating "the rates charged" for CMRS, but it expressly reserves to them the authority to regulate the "other terms and conditions of commercial mobile services." Although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities Ohio is entitled to continue, despite our denial of its Petition.

41. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:[108]

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

42. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the Ohio Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

43. Ohio states that it presently exercises jurisdiction over cellular service providers and radio common carriers to ensure that wholesale cellular rates are not below cost through its complaint authority, to monitor the industry, and to review contractual interconnection and roaming arrangements.[109] First, although Ohio may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS rates, it does not follow that its complaint authority under State law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.[110] In consequence, it is conceivable that matters might arise under state complaint procedures that relate to "customer billing information and practices and billing disputes and

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[103] Ohio Petition at 1-2, 6.

[104] Finding and Order, Competitive Telecommunications Services, Case No. 89-563-TP-COI, 1993 WL 500056, slip op. at *16 (Ohio P.U.C. Oct. 22, 1993).

[105] An important indicator of market failure, in our view, would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price. *See* Section III, *supra*. No such demonstration exists on this record.

[106] The statute provided in relevant part that "[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . . ." 47 U.S.C. § 332(c)(3) (prior to revisions enacted by OBRA).

[107] *See, e.g.*, Telocator Network of America v. FCC (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission's interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). *See also, e.g.*, American Teltronix (Station WNHM552), 3 FCC Rcd 5347 (1988)("Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier."), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990)(note omitted) ("state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute .... [A]ccompanying legislative history reveals that Congress recognized the Commission's broad discretion to dictate which land mobile systems are to be regulated as private."). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission's Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 n.19 (1990):

> If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

[108] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261.

[109] Ohio Petition at 1-4.

[110] *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person "complaining of *anything done or*

other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit Ohio to continue to conduct proceedings on complaints concerning such matters, to the extent that State law provides for such proceedings. Further, the Committee's list of "other terms and conditions" explicitly contemplates review by states of contractual arrangements relating to "transfers of control." We conclude, therefore, that Ohio's review of contractual agreements between two or more CMRS providers, including interconnection agreements and roaming agreements entered into by CMRS providers, also falls within the "other terms and conditions" language of section 332(c)(3) to the extent that such review does not directly affect end-user rates.[111]

44. Under the same logic, we also conclude generally that several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the public utility commission, or whatever other agency the State decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe Ohio retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state. We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of the Ohio regulatory practice at issue.

45. Finally, however, the statutory language is not broad enough to accommodate Ohio's apparent interest in asserting authority to regulate marketplace entry by CMRS providers.[112] Section 332(c)(3) completely preempts state entry regulation of CMRS.[113]

## VII. ORDERING CLAUSES

46. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), IT IS ORDERED that the Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services IS DENIED for the reasons set forth above.

47. IT IS FURTHER ORDERED, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order SHALL BE FILED within thirty days of the day after the day on which public notice of this action is given.[114]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

### Parties Filing Comments or Replies

Public Utilities Commission of Ohio (Ohio or OPUC)

AMSC Subsidiary Corporation (AMSC)

Airtouch Paging

American Mobile Telecommunications Association, Inc. (AMTA)

Ameritech Communications, Inc. (Ameritech)

Cellular Telecommunications Industry Association (CTIA)

E.F. Johnson Company (E.F. Johnson)

GTE Mobilenet Incorporated (GTE)

McCaw Communications, Inc. (McCaw)

Mobile Telecommunications Technologies Corp. (MTel)

National Cellular Resellers Association (NCRA)

New Par

Nextel Communications, Inc. (Nextel)

PageMart, Inc. (PageMart)

Paging Network, Inc. (PageNet)

Personal Communications Industry Association (PCIA)

Ray's Electronics, Inc. (Ray's Electronics)

Rural Cellular Association

Sprint Cellular Company (Sprint)

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*omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a)(emphasis added).

[111] Ohio Petition at 2.

[112] *See* Ohio Petition at 1-2, 6.

[113] Section 332(c)(3)(A) provides: "no state or local government shall have any authority to regulate the entry of . . . any commercial mobile radio service." 47 U.S.C. § 332(c)(3)(A).

[114] Although we assigned the OPUC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Policy and Rules Concerning Rates for Dominant Carriers | CC Docket No. 87-313 |
| Revisions to Price Cap Rules for AT&T | CC Docket No. 93-197 |

**FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: May 5, 1995; Released: May 18, 1995**

**Comments Due: July 3, 1995**
**Reply Comments Due: July 24, 1995**

By the Commission:

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## I. INTRODUCTION

1. In this Further Notice we initiate a further examination of our regulation of services provided by AT&T Corporation (AT&T) subject to price cap treatment and, in particular, the regulation of AT&T's residential services. We seek comments on, among other things, our tentative conclusion that promotional tariffs and optional calling plans (OCPs) should remain subject to price cap regulation to the extent described herein. These issues have been addressed in two separate proceedings. In the Notice of Proposed Rulemaking in CC Docket No. 87-313,[1] the Commission sought comments on its tentative conclusion to remove promotions from price cap regulation. In the Notice of Proposed Rulemaking in CC Docket No. 93-197,[2] the Commission sought comment on, among other issues, whether to remove OCPs from price cap regulation. Due to the commonality of the issues presented in determining the regulatory treatment of promotions and OCPs, we consolidate these issues here in one Further Notice of Proposed Rulemaking for further consideration.

2. This Further Notice also asks for comment on a broader range of issues than were raised in either of the earlier Notices in both dockets. Although we will consider the earlier records in these dockets, we invite commenters to supplement the record by addressing all of the issues raised herein. Specifically, we go beyond the earlier proceedings in both dockets to seek comments on our tentative conclusions regarding the regulatory treatment, described in detail below, that we would accord to all AT&T's Basket 1 services.[3] Our tentative conclusions also address issues raised in AT&T's petition for waiver of the price cap rules, which is pending before the Commission.[4] In addition, we tentatively conclude that we should revise the treatment of AT&T's exogenous costs to conform to the revisions that we adopted in the *LEC Price Cap Performance Review Report and Order*.[5]

3. Price cap regulation is designed to mirror the efficiency incentives found in competitive markets, thus acting as a transitional regulatory scheme until the advent of substantial competition makes price cap regulation unnecessary.[6] One purpose of the revisions on which we seek comment below is thus to provide a regulatory framework that will better serve the transition to further streamlining of AT&T's price cap services. AT&T has asked the Com-

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order and Notice of Proposed Rulemaking, 8 FCC Rcd 3715 (1993) (*Promotions NPRM*).

[2] Revision to Price Cap Rules for AT&T, CC Docket No. 93-197, Notice of Proposed Rulemaking, 8 FCC Rcd 5205 (1993) (*OCP NPRM*). The Commission also proposed a number of other changes to the price cap rules in the *OCP NPRM*, including whether to remove commercial, 800 Directory Assistance, and analog private line services from price caps. In the Report and Order in CC Docket No. 93-197, 10 FCC Rcd. 3009 (1995) (*Commercial Services Price Cap Order*) the Commission resolved these issues, removed commercial services from price cap regulation, and deferred the question of the regulatory treatment of OCPs to this proceeding.

[3] *See* paras. 4-7, *infra*, for an explanation of price caps regulation and Basket 1. Although the earlier proceedings in both dockets involved OCPs, a service category in Basket 1, and promotions for certain Basket 1 services, they did not address all the services in Basket 1.

[4] AT&T Corp. Petition for Waiver of Price Cap Rules to Allow AT&T to Bring the LDMTS Basic Schedule NPA Volume Discount Option Under Price Caps (filed May 17, 1994) (*AT&T Price Cap Waiver Petition*).

[5] Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1, FCC 95-132 (rel. April 7, 1995) *LEC Price Cap Performance Review Report and Order*.

[6] *See id.* at ¶ 1.

mission to rule that AT&T is a non-dominant carrier and, accordingly, should be permitted to remove all of its services from price cap regulation.[7]

## II. BACKGROUND

4. In 1989, the Commission replaced rate-of-return regulation of AT&T with an incentive-based system of regulation, known as price caps, for most of AT&T's telecommunications services.[8] The Commission stated that price caps would encourage efficiency and innovation while decreasing the incentive for AT&T to shift costs from more competitive to less competitive service offerings.[9] Under this system, prices are capped rather than profits. Thus, the plan gives AT&T the incentive to earn potentially higher profits if it can operate more efficiently, for example, by reducing its costs. To implement the price cap system, the Commission defined three categories of AT&T services, or baskets, and defined a price cap index (PCI) for each basket.[10] The basket structure is designed so that AT&T will not be able to raise prices for services in one basket in order to lower prices for dissimilar services in another basket.[11] Thus, a change in rates in one basket or in services outside price caps does not affect either the PCI or the actual price index (API) for the other baskets. The PCI for each basket imposes a price ceiling for the services in that basket. In order for the Commission to determine whether rate levels exceed the PCI, AT&T must compute and file for each basket an actual price index (API), which represents a weighted average of actual prices of the services within the basket.[12] PCIs and APIs are adjusted each year in AT&T's annual price caps filing to reflect the annual productivity offset of 3 percent and exogenous cost changes.[13] In addition, the API is computed for every tariff transmittal that includes a rate change.

5. AT&T may change rates for services within each basket subject only to streamlined scrutiny, provided that the weighted average of all those prices remains below the cap.[14] Under streamlining, the tariff filing is presumed lawful and may take effect on 14 days' notice without extensive cost support data. If, however, the proposed rate change would push a basket API above the cap, AT&T is required to file the change on the statutory maximum notice period of 120 days and to provide a full cost-based showing for such filings.[15]

6. Basket 1 is further divided into service categories, or bands.[16] In the *AT&T Price Cap Order* the Commission concluded that "banding by service category, rather than by rate element, will give AT&T the flexibility it requires to allocate costs and price efficiently, while still protecting customers from large rate increases and rate churn."[17] An individual service band index (SBI) is established for each service band. SBIs for all service bands are calculated each year in AT&T's annual price caps filing. In addition, for any price cap tariff filing proposing changes in the rates of service categories, AT&T must calculate an SBI value for each affected service category.[18]

7. AT&T's Basket 1 historically has included toll services targeted to residential and small business customers. We recently removed AT&T's Basket 1 commercial services from price cap regulation and made them subject to streamlined regulation.[19] As a result, Basket 1 currently is divided into six service categories, all of which include primarily residential services.[20] Residential services have

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[7] *See* Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, CC Docket 79-252 (filed Sept. 22, 1993).

[8] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987) (*Price Cap NPRM*), Further Notice of Proposed Rule Making, 3 FCC Rcd 3195 (1988) (*Further Notice*), Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989) (*AT&T Price Cap Order*), Erratum, 4 FCC Rcd 3379 (1989), *on reconsideration*, 6 FCC Rcd 665 (1991) (*Reconsideration Order*), *remanded sub nom. American Telephone and Telegraph Company v. FCC*, 974 F.2d 1351, 1353 (D.C. Cir. 1992) (*Remand Order*). Those services that are not in price caps are subject to streamlined regulation, which reduces their regulatory obligations under Part 61 of the Commission's Rules. Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) (*Interexchange Order*), *on reconsideration*, 6 FCC Rcd 7569 (1991) (subsequent history omitted).

[9] *Price Cap NPRM*, 2 FCC Rcd at 5213.

[10] The three baskets were comprised respectively of: (1) residential and small business services; (2) "800" number services; and (3) other business services. Recently the Commission removed Basket 1 commercial services from price cap regulation. *See* note 2, *supra*. In addition, a number of AT&T services are excluded from price cap regulation, including: (1) services offered pursuant to Tariffs 11, 12 and 16; (2) services subject to below-the-line accounting; (3) international private line and record carrier services; (4) contract-based tariffs; and (5) the custom tariff services removed from price cap regulation pursuant to CC Docket No. 90-132. *See* 47 C.F.R. § 61.42 (c). Services subject to below-the-line accounting are services that AT&T is not able to operate at a profit, such as KU Band Satellite and Accunet Packet Services. Custom tariff services are services such as Software Defined Network that AT&T provides to large business customers.

[11] *See also Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Service under Price Cap Regulation*, CC Docket No. 94-1, FCC 95-49 (rel. February 15, 1995).

[12] *See Reconsideration Order*, 6 FCC Rcd at 665-66, for an explanation of how the price cap index is calculated.

[13] Exogenous costs are costs that change due to changes in laws, regulations, or rules, or other administrative, legislative, or judicial changes beyond a carrier's control and are not reflected in the GNP-PI. *Further Notice*, 3 FCC Rcd at 3383 n.738.

[14] In addition to setting limits on the aggregate rates within each basket, the Commission also instituted rate bands to limit the range within which AT&T could raise or lower individual rate element prices each year while continuing to receive streamlined tariff scrutiny. *AT&T Price Cap Order*, 4 FCC Rcd at 3077, *citing Further Notice*, 3 FCC Rcd at 3440.

[15] *See AT&T Price Cap Order*, 4 FCC Rcd at 3109-11.

[16] Baskets 2 and 3 also were divided into service bands or categories. A number of Basket 2 and 3 services were removed from price cap regulation and are now subject to streamlined regulation. As a result, Basket 2 currently contains only 800 Directory Service, and Basket 3 contains analog private line offerings, including analog voice grade private line and terrestrial television transmission service. *See* 47 C.F.R. § 61.42(a)(2)-(3).

[17] *Id.* at 3059.

[18] *See* 47 C.F.R. § 61.43 (annual price cap filings required) and 47 C.F.R. § 61.47 (adjustments to the SBI; pricing bands).

[19] *See Commercial Services Price Cap Order*, 10 FCC Rcd. at 3011.

[20] Basket 1 includes the following service categories: (1) domestic day message telecommunications service (MTS); (2) domestic

been the object of special Commission concern since the beginning of price cap regulation, when it sought to balance concerns for economic efficiency with the need to minimize the possibility of cross-subsidization and predation and to foster competition that would benefit all ratepayers.[21] The Commission recognized that residential customers are significant users of day, evening, and night/weekend MTS.[22] The pricing for evening and night/weekend MTS, which are predominantly used by residential customers, originally was subject to an upward band limit of four percent per year.[23] In addition, we barred AT&T from increasing the average rate paid by residential customers for services in Basket 1 by more than one percent per year relative to the change in the PCI.[24]

8. An integral part of the price cap plan is a periodic review of the working of the plan to determine whether it is functioning as the Commission intended and in accordance with the Communications Act. Accordingly, the Commission adopted a program that combines ongoing monitoring of the price cap plan with periodic formal reviews. The Commission undertook the first performance review, as scheduled, in 1992.[25]

9. As a result of that review, the Commission determined that, while overall the price cap plan is achieving its intended goals, some adjustments to the plan might enhance its effectiveness.[26] Accordingly, the Commission initiated another proceeding to determine whether the price cap plan should be revised in four specific areas.[27] In particular, the FCC sought comment on whether to remove commercial services, 800 Directory Assistance, analog private line service, and optional callings plans (OCPs) from price caps.[28] The Commission did not address AT&T's promotional offerings in this proceeding. In the recently released *Commercial Services Price Cap Order*,[29] we removed AT&T's commercial services from price caps regulation. In that Order, we stated that "AT&T demonstrates both in its comments and through additional information submitted in the record of this proceeding that there is sufficient evidence to conclude that AT&T's commercial long distance services are subject to substantial competition." We stated that ". . . our analysis rests on considerations of market share, demand responsiveness and supply responsiveness. As the result of this analysis, we conclude that AT&T lacks the ability to exercise unilateral market power in the provision of these services and that there is sufficient competition among providers to justify moving AT&T's commercial services from price caps to streamlined regulation."[30] We concluded, however, that 800 Directory Assistance should remain under price cap regulation because it ". . . remains a monopoly service and therefore it is necessary to regulate the price for this service to protect consumers."[31] Further, we concluded that analog private line services should remain under price caps regulation because "none of the parties has presented any evidence that the situation has changed since the Commission's 1991 decision in the *Interexchange Proceeding*."[32] We stated that "[t]he Commission concluded that the market for these services was not as competitive as the market for other services offered by AT&T and therefore required continued oversight under price caps."[33] We deferred to this consolidated proceeding further consideration of the removal of OCPs from price caps.[34]

### A. *AT&T Promotions*

10. A promotion usually involves a discounted offering of an existing tariffed service or service category to a particular sub-class of customers for a limited period of time.[35] For example, promotions might be limited to customers in a particular geographic area, to customers that historically have achieved a specified level of monthly usage, or to new

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evening MTS; (3) domestic night/weekend MTS; (4) international MTS; (5) operator and credit card service; and (6) ReachOut America (OCPs). *See* 47 C.F.R. § 61.42(b). ReachOut America was the original OCP that comprised category 6. Currently, most OCPs for domestic MTS are in the ReachOut America service category. *See infra* at notes 62 & 64 and accompanying text.

[21] *See AT&T Price Cap Order*, 4 FCC Rcd at 3051-52, 3059-60; *see also Interexchange Order*, 6 FCC Rcd at 5908 (noting need for "particular caution" in streamlining residential and small business services).

[22] *AT&T Price Cap Order*, 4 FCC Rcd at 3059. We will refer to AT&T's non-discounted pricing in these three bands throughout this Further Notice as the "basic schedule" of residential service rates.

[23] *Id.* at 3060; 47 C.F.R. § 61.47(f).

[24] *AT&T Price Cap Order*, 4 FCC Rcd at 3060-61; 47 C.F.R. § 61.47(f)(2).

[25] Price Cap Performance Review for AT&T, Notice of Inquiry, CC Docket No. 92-134, 7 FCC Rcd 5322, 5323 (1992).

[26] Price Cap Performance Review for AT&T, Report, 8 FCC Rcd 5165 (1993) (*AT&T Performance Review Report*).

[27] Revisions to Price Cap Rules for AT&T, CC Docket No. 93-197, Notice of Proposed Rulemaking, 8 FCC Rcd 5205 (1993) (*OCP NPRM*). In addition, the Commission requested more information from AT&T regarding AT&T's Equipment Failure and Blockage Reports, which track AT&T's service quality and network reliability. The Commission recently adopted a Report and Order on the issues other than OCPs that were raised in the *OCP NPRM*. *See Commercial Services Price Cap Order*, FCC 95-18, note 2, *supra*, in which the Commission resolved these issues and deferred the question of the regulatory treatment of OCPs to this proceeding.

[28] Streamlined regulation was adopted for Basket 3, except for analog private lines, effective in October 1991. *Interexchange Order*, 6 FCC Rcd at 5894 and 6 FCC Rcd 7255 (Com. Car. Bur. 1991). Streamlining of Basket 2, except for 800 Directory Assistance, took effect in May 1993 following the successful deployment of the technology for 800 number portability. "Portability" refers to 800 number subscribers' ability to retain their 800 numbers when switching their 800 service from one IXC to another. The Commission ordered local exchange carriers (LECs) to implement technology to make such portability possible no later than March 4, 1993. *Interexchange Order*, 6 FCC Rcd at 5905-06, *citing* Provision of Access for 800 Service, CC Docket No. 86-10, 6 FCC Rcd 5421, 5425 (1991). In response to petitions of the Ad Hoc Telecommunications Users Committee and the Financial Services Providers, the Commission granted a three-month delay, until May 1, 1993, for implementing the mandatory 800 data base access. Provision of Access for 800 Service, CC Docket No. 86-10, 7 FCC Rcd 8616 (1992).

[29] *Commercial Services Price Cap Order*, 10 FCC Rcd. at 3011.

[30] *Id.* at 3014.

[31] *Id.* at 3023.

[32] *Interexchange Order*, 6 FCC Rcd at 5895.

[33] *Commercial Services Price Cap Order*, 10 FCC Rcd. at 3024.

[34] *Id.* at 3011.

[35] On occasion, AT&T's promotions alternatively have provided, among other things, long distance gift certificates or points to be redeemed for merchandise and travel.

subscribers.[36] Thus, while the basic rates for a service remain in effect and apply to some customers of a service, other customers of that service may be paying a discounted rate for a specified period of time. In other instances, all customers of a service may receive the discounted rate for a specified time, and then revert to the basic rates when the promotion expires.[37]

11. The Commission was silent in the *AT&T Price Cap Order* as to the treatment of promotional rates under price caps. After the Commission adopted the price cap rules, AT&T filed a significant number of promotions in which it treated the rates associated with these offerings as rate reductions for purposes of API calculations. MCI Telecommunications Corporation (MCI) and Sprint Communications Company LP (Sprint) sought reconsideration of the *AT&T Price Cap Order*, requesting clarification of the treatment promotional pricing activities should receive under price caps.[38] In the *Reconsideration Order*, the Commission decided to exclude promotional tariffs from the price cap index prospectively. It reasoned that including promotional rates in price caps would give AT&T too much flexibility to change prices within Basket 1, which contained residential and small business rates.[39] Although the Commission decided to exclude promotions from price caps, it also stated that "as long as a promotional offering does not raise discrimination issues or otherwise fail to comply with the Communications Act, we will not limit AT&T's efforts to generate greater network efficiencies by restricting promotional activity."[40]

12. In its appeal of the *Reconsideration Order*, AT&T asked the court to vacate the Commission's decision to exclude promotional offerings from price caps as arbitrary and capricious because the Commission failed to explain adequately its change in the treatment of promotional rates.[41] The court agreed with AT&T, finding that the Commission's decision to exclude promotional tariffs from the price cap index was not a reasoned decision supported by the record. The court remanded the *Reconsideration Order* to the Commission with instructions either to show that its action is a clarification of the original *Price Cap Order*, despite the evidence AT&T presented to the contrary, or to "offer a reasoned explanation of why promotional rates should be treated differently from other rates."[42]

13. In response, the Commission vacated its prior decision on this issue and issued the *Promotions NPRM* in Docket 87-313, in which it tentatively concluded that promotions should be excluded from price cap regulation prospectively.[43] The Commission offered several reasons to support this proposal. First, a basic purpose of price caps is to assure a reasonable basic schedule of long distance rates for ratepayers. Although price cap regulation is designed to reward efficiency by granting carriers flexibility in pricing individual services, the Commission had rejected a price cap system that would have granted AT&T unlimited flexibility to increase basic schedule rates to offset promotional rate decreases.[44] The Commission reasoned that "[i]f AT&T is allowed to take index credit for promotions, its actual price index (API) would decrease. As historically has been the case, AT&T could then increase its API by increasing general schedule rates." The Commission tentatively concluded that:

> permitting promotional offerings to be used as a basis for raising basic schedule rates, without limitation, would strongly encourage the proliferation of excessive promotional offerings and undercut the efficiency incentives of the price cap program. For example, AT&T could attempt to promote its services to customers of other IXCs with the promise of interim rate cuts or long distance gift certificates, and then protect its revenue stream by increasing rates in the basic MTS schedule for existing customers. . . . In other words, AT&T could offer promotions when it needed to raise general schedule rates to cover its inefficiencies even though price cap regulation is designed to provide an incentive for companies to operate more efficiently.[45]

The *Promotions NPRM* further reasoned that "since one of the fundamental purposes of price cap regulation is to put AT&T on a more equal competitive footing with other IXCs, allowing AT&T to insulate itself from revenue losses caused by promotional pricing undercuts one of the basic goals of price cap regulation."[46] The Commission concluded that "[i]f AT&T operated in a completely competitive market, this issue would be moot because AT&T could not raise general schedule rates without the fear of losing customers to a competitor."[47]

14. The Commission thus tentatively concluded that "allowing AT&T to offset rate reductions for promotional offerings against increases in the basic rates could undercut the Commission's enforcement mechanism for price cap regulation."[48] For example, under price cap rules, if AT&T were to file an above-cap tariff, the filing would be subject to full regulatory scrutiny and possible suspension.[49] The potential problem, however, as described by the Commission in the *Promotions NPRM*, is that if AT&T were to file

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[36] *Reconsideration Order*, 6 FCC Rcd at 671.

[37] For example, AT&T offered a discount off Reach Out World service during December 24, 1994 through January 31, 1995 to customers who originate calls from Hawaii. AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 7856 (effective Dec. 24, 1994).

[38] *Reconsideration Order*, 6 FCC Rcd at 671.

[39] The Commission subsequently removed commercial services from price cap regulation. *Commercial Services Price Cap Order*, 10 FCC Rcd. at 3011.

[40] *Reconsideration Order*, 6 FCC Rcd at 670.

[41] *See Remand Order*, 974 F.2d at 1353.

[42] *Id.* at 1355.

[43] *Promotions NPRM*, 8 FCC Rcd at 3717.

[44] *Id.* at 3716, *citing Reconsideration Order*, 6 FCC Rcd at 665-69 (Commission established baskets and bands to limit pricing flexibility).

[45] *Id.* at 3716. This reasoning assumes that a rate increase would offset the depressive effect that such an increase would have on demand and that AT&T basic schedule customers would not respond to such increases by switching to another carrier.

[46] *Id.*

[47] *Id.* at 3716 & n.14 . This reasoning assumes that the existing rates reflected competitive levels.

[48] *Id.* at 3716.

[49] *See* para. 2, *supra*.

a promotional tariff that decreased rates for certain services within Basket 1, the API would be lowered for the duration of the promotion, thus allowing AT&T to raise rates within the basket for other services without exceeding the basket's PCI. When the promotion expired, however, the API would rise and prices for some services within the basket could be left above cap for the period of time between the expiration of the promotion and the next AT&T rate filing that proposed rates above the PCI.[50] Because the promotion had expired, however, the Commission could not investigate it in order to deter unreasonable, above-cap rates for the basket.[51]

15. As an alternative, the Commission sought comment on whether to treat promotional tariffs as either new or restructured services.[52] Under price cap regulation, a service is classified as new if it provides an additional option to a service, but does not replace the existing service. Conversely, a service is classified as a restructured offering if it replaces an existing service.[53] Rates for restructured services are immediately incorporated into the price cap calculations upon effectiveness of the tariff. Rates for new services, however, are not incorporated into the price cap calculations until the first annual price cap tariff filing following completion of the base period in which they are introduced.[54] At that point, actual revenues and demand data for the service are available. A promotion resembles a new service because it provides a new option, a discount from the existing basic schedule, which does not replace the existing service. On the other hand, a promotion differs from a new service, in that it restricts the availability to eligible customers and limits the time during which those customers may subscribe to the promotion. New services are generally available and may be ordered at any time. A more significant distinction is that as a result of the 1992 court of appeals decision,[55] promotions are incorporated into price cap calculations immediately upon effectiveness of the tariff, while new services are excluded from price caps until AT&T has obtained actual demand and revenue information concerning the service.

16. Commenters other than AT&T generally supported the Commission's proposals and tentative conclusions as set forth in the *Promotions NPRM*. They asserted that excluding the value of promotions from API calculations would protect one group of ratepayers from subsidizing the promotions that benefit another group of ratepayers[56] and would be consistent with the goals of price cap regulation.[57]

17. In opposing the proposals set forth in the Promotions NPRM, AT&T argued that its promotional tariffs are not different from other types of tariff filings and should be entitled to receive index credit under the Commission's price cap plan.[58] Moreover, AT&T argued that because none of its promotions has been rejected or suspended for violations of Sections 201(b) and 202(a) of the Communications Act, there is no justification for treating promotional tariffs differently from other price cap tariff filings.[59] AT&T also disputed the Commission's argument that including promotional tariffs in price caps will create the potential for cross-subsidization,[60] especially given their short duration.[61]

18. AT&T further contended that both MCI and Sprint have made extensive use of promotional offerings throughout the time that AT&T has been subject to price caps. AT&T argued that it therefore would be at a competitive disadvantage if the Commission did not permit it to receive index credits for promotions.[62] Finally, AT&T stated that it is required to disclose certain information about its promotions to the Commission. According to AT&T, it would be impossible to raise the API for its capped services above the price cap index at the expiration of a promotion without prompt detection and immediate corrective action by the Commission.[63]

19. As discussed above, the Commission was initially silent on the issue of promotions. Our decision on the subject in the *Reconsideration Order* was then remanded by the court of appeals, and we have taken no action following the *Promotions NPRM*. In the meantime, AT&T has introduced new promotional offerings that expand the general class of discounts offered under the term "promotions." For example, the original class of promotions implemented by AT&T in 1989, which it submitted in a "generic" tariff, consisted of discounts on monthly usage charges.[64] These promotions were limited to designated services or to customers in specified geographic areas, and were of short duration, in some instances lasting no more than 90 days.[65]

20. In recent years, however, AT&T has introduced several widely-available mass-market discounts for domestic MTS, such as the current "True USA" and "True Rewards" (the "True promotions"). AT&T reported that, for calendar year 1994, 17 million customers enrolled in the True USA savings plan, and 14 million customers enrolled in the True Rewards program.[66] In addition, discounted interstate long-distance calls under the True promotions accounted for 53 percent of all minutes of consumer, *i.e.*, Basket 1, traffic on AT&T's network in 1994, whereas in 1993, interstate long-distance usage under discount plans that were in effect in that year accounted for 33 percent of Basket 1 traffic.[67] The True promotions also attracted an additional 1

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[50] *See* 47 C.F.R. § 61.49(c), which requires filings that propose rates above the applicable SBI limits to be accompanied by supporting materials establishing substantial cause for the proposed rates.

[51] *Promotions NPRM*, 8 FCC Rcd at 3716.

[52] *Id.* at 3717.

[53] *See Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6824-25 (1990).

[54] *See* 47 C.F.R. §§ 61.44(g), 61.46(b), and 61.47(b).

[55] *See Reconsideration Order, remanded sub nom. American Telephone and Telegraph Company v. FCC*, 974 F.2d 1351, 1353 (D.C. Cir. 1992) (*Remand Order*).

[56] Sprint Comments at 2-3; *see also* GTE Comments at 2.

[57] GTE Comments at 2.

[58] AT&T Comments at 10-11.

[59] *Id.* at 14-15.

[60] *Id.* at 11-12, *citing Reconsideration Order*, 6 FCC Rcd at 670.

[61] *Id.* at 12-13.

[62] *Id.* at 16-17 and Exhibit C.

[63] *Id.* at 18.

[64] *See, e.g.*, AT&T Communications, Transmittal Nos. 1431 and 1552, Revisions to Tariff F.C.C. Nos. 1, 2, 4, 7, 9, 11, 13, and 14, 4 FCC Rcd 4475 (Com. Car. Bur. 1989).

[65] *Id.*

[66] *See AT&T Posts Earnings Increase*, Communications Daily, January 25, 1995, at 3.

[67] *Id.*

million new customers for AT&T in 1994.[68] The amount of actual discounts off basic schedule domestic MTS rates to customers under the True USA promotion during the month of November 1994, alone, was $265.3 million.[69] This unprecedented growth in AT&T's promotional activities has caused a major realignment in prices for Basket 1 services, especially basic schedule rates. Basic schedule ratepayers who have not elected a promotional discount plan have generally witnessed steady increases in their rates over the same period of time that AT&T has introduced mass-market promotions for residential customers.[70]

**B. *AT&T Optional Calling Plans***

21. AT&T's promotional offerings to date have involved discounts based on its basic schedule MTS rates. Optional calling plans (OCPs) offer discounts or reduced rates for a specified period of calling to long distance customers in exchange for the customer's commitment to a fixed monthly charge or to participate for a minimum period of service.[71] Addressing AT&T's initial types of OCPs, for example, the Commission in the *OCP Guidelines Order* adopted the following definitions:

> *Basic MTS:* MTS service as it was offered pursuant to AT&T tariffs in effect before June 7, 1984, the effective date of the AT&T Block of Time plan [citation omitted].
>
> *Optional Calling Plan:* A supplemental or additional MTS offering which allows customers to take MTS under an alternative, nontraditional pricing mechanism. For example, an OCP may offer service on a distance-insensitive basis or in bulk at reduced rate. An OCP may not involve changes to the rates or rate structure of the underlying basic MTS service.[72]

22. OCPs are usually designed to attract frequent callers who can take advantage of the discounts and other benefits to reduce their bills.[73] Examples of OCPs in the ReachOut service category include Block-of-Time (such as ReachOut America), Any Hour Saver, and EasyReach service.[74] MCI, Sprint, and a number of other interexchange carriers also offer discounted residential services that compete with these AT&T offerings.[75]

23. The price cap system's treatment of OCPs also differs from that accorded promotions. OCPs are included in a separate service category (the Reach-Out service category) from the basic MTS service categories within Basket 1,[76] whereas promotions are included in the applicable MTS service categories. Changes in OCP rates, therefore, are not subject to the SBI limitations on rate changes in the basic schedule service categories.

24. In the *OCP NPRM*, the Commission tentatively concluded that the ReachOut category of services (*i.e.*, most domestic MTS OCPs) should be removed from Basket 1 because there is substantial competition among providers of discounted residential services. The Commission noted that because rates for these services already appeared to be determined by market forces, not price cap limits, customers were unlikely to be harmed if the Commission made these services subject to streamlined regulation in the tariff review process. Moreover, customers would retain the option of choosing between AT&T's basic schedule or the discounted services of AT&T and other carriers.[77] The Commission also noted that to the extent that ReachOut services have had larger rate reductions than the standard long distance schedules for which they are substitutes, removal of ReachOut services from Basket 1 might encourage AT&T to target productivity gains to customers for the standard service.[78]

25. The Commission sought comment on whether the treatment of OCPs under the AT&T price cap plan should be changed, and, if so, inwhat manner. Specifically, the Commission sought comment on whether it should adjust the API or the PCI for Basket 1 to reflect the removal of OCPs from Basket 1. As an alternative to removal of OCPs from price cap regulation, it asked for comment on whether OCPs should remain subject to price cap regulation, but be placed in a separate basket.

26. In its initial comments, AT&T supported removing OCPs from Basket 1 "without delay"[79] in order to gain the pricing flexibility it assertedly needs to respond to market conditions and customer demands.[80] AT&T also contended that if the Commission adopted new streamlined regulations for OCPs, it should not adjust the API or PCI to eliminate the "headroom" for Basket 1 services that AT&T would gain from this action.[81] In its reply comments, however, AT&T changed its position, and argued that, because the rates for residential OCPs and basic residential schedule services have been reduced significantly under price

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[68] *See* Edmund L. Andrews, *No-Holds-Barred Battle For Long-Distance Calls*, New York Times, January 21, 1995, at 48.

[69] *See* Letter, from M.F. Del Casino, Administrator -- Rates & Tariffs, AT&T, to Acting Secretary, Federal Communications Commission (Dec. 27, 1994).

[70] *See* discussion at para. 28, *infra*.

[71] By contrast, a typical mass-market promotion offered by AT&T requires enrollment or "self-selection," but does not usually bind a customer to a minimum payment or term of service.

[72] Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, CC Docket No. 94-1235, 59 Rad. Reg. 2d (P&F) 70, 71-2 n.3 (1985) (*OCP Guidelines Order*).

[73] *OCP NPRM*, 8 FCC Rcd at 5205.

[74] Examples of OCPs offered in other Basket 1 service categories are: international (ReachOut Overseas and USA Direct), operator/card (Card Only Plan 1), and day, evening, and night/weekend (Area Code Calling Plan).

[75] For example, Sprint offers Sprint Select; MCI offers such plans as Prime Time and Sure-Save.

[76] The majority of OCPs are offered in the ReachOut service category. AT&T now also offers certain OCPs in the other service categories in Basket 1. *See* note 72, *supra*.

[77] *OCP NPRM*, 8 FCC Rcd at 5205.

[78] *Id.*The PCI is adjusted each year to reflect a 3.0 percent productivity gain. To the extent that the price caps formula results in a lowered PCI, AT&T must reduce rates for Basket 1 each year to remain under the PCI. If OCPs were removed from Basket 1, the reduced rates required as a result of a lowered PCI would affect only the remaining services in the basket, and therefore could potentially result in proportionally greater rate decreases for these services.

[79] AT&T Comments at i.

[80] *Id.* at 4.

[81] As discussed in the next section, headroom is the gap between AT&T's Actual Price Index (API) and its price cap index (PCI) ceiling for Basket 1.

cap regulation, both categories of service should be removed from price caps and subject to streamlined regulation.[82] AT&T also opposed moving OCPs to another basket if they remained under price cap regulation.[83]

27. Although all commenters agreed that AT&T has maintained a market share for interstate traffic in the low 60 percent range for the past three years,[84] many commenters expressed doubts that reducing price cap regulation over AT&T would benefit consumers.[85] Some commenters expressed concern that AT&T would use the $270 million in headroom that would result from removing OCPS from Basket 1 to raise prices on the remaining services in the basket.[86]

### C. *The "Headroom" Issue*

28. Because mass-market promotions such as AT&T's True offerings are widely available to all customers, they can create apparent anomalies when calculating earnings and establishing indexes under the existing price cap plan. For example, AT&T may use the forecasted demand for its promotional plans to lower its adjusted price index (API) for Basket 1 services.[87] By substantially lowering the API,[88] AT&T's mass-market promotions also maximize the gap -- or "headroom" -- between AT&T's API and its price cap index (PCI) ceiling for Basket 1. AT&T's headroom in Basket 1 determines the extent to which AT&T can raise rates for non-discounted Basket 1 residential services without exceeding the PCI ceiling or the upper limits of its service band indexes (SBIs). Mass-market promotions, therefore, give AT&T the ability to offer widespread discounts to some residential services ratepayers, while increasing the basic schedule rates, without exceeding the SBI ceiling for the rate increases or dropping below the SBI floor with its promotional discounts.[89] If AT&T's basic schedule rate increase offsets the demand decrease caused by the higher basic schedule rates, AT&T would not forego any revenues as a result of its promotional offerings.

29. The headroom that permits these basic rate increases is, moreover, predicated upon forecasts of the expected demand for the promotional offerings. Currently, AT&T forecasts its demand for the life of the promotion at the time the promotion is filed. An error in this forecast could permit AT&T to adjust the API downward based on forecasts for higher demand for a promotion than actually materialize. In such a situation, AT&T would be able to increase its basic rates more sharply than if actual demand were used to calculate the effect of the promotional offering on the API. Customers of basic schedule service consequently are charged more for service when AT&T's forecasts for promotions are higher than actual demand. No mechanism exists under the price cap rules to correct for any inaccuracies in forecasted demand, although AT&T has committed from time to time to "true up" its headroom calculation based on actual demand.[90] AT&T, however, is not required to refund overcharges to customers of basic schedule service.

30. AT&T has increased its basic schedule rates in Basket 1 during the past two years concurrently with the implementation of its True promotion offerings. For example, on December 5, 1994, AT&T implemented an average rate increase in basic schedule MTS rates of 3.9 percent, valued at $274 million.[91] On December 27, 1994, AT&T also raised rates for optional calling plans, operator/card services, and international MTS (IMTS) within Basket 1 by approximately $260 million.[92] Increases in AT&T's basic schedule rates are also reflected in studies conducted by Commission staff, which are based on the Bureau of Labor and Statistics's (BLS) consumer price index (CPI) and producer price index (PPI) for interstate toll calls from 1984 through May, 1994. The Commission staff study, released in May, 1994, found that AT&T's basic schedule rates increased by 6.5 percent for calendar year 1993 and 9.3 percent from March 1993 through March 1994, based on the BLS-maintained consumer price index (CPI) for interstate toll services.[93] A study completed by Commission staff in February, 1995, which addresses AT&T's long distance prices through year-end 1994, finds that the CPI for AT&T's interstate toll calls increased a total of 5.4 percent in 1994.[94]

31. AT&T has informally objected to the use of the CPI and PPI as measures of rate changes. AT&T contends that the indices are not reliable indicators of overall long distance pricing performance because they do not adequately reflect the offsetting effect of discount plans.[95] The Commission staff study released in February, 1995, for example,

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[82] *Id.* at 9-10.

[83] *Id.* at 4.

[84] Comments regarding OCPs were filed by AT&T, Sprint Communications Company LP (Sprint), WilTel, Inc. (WilTel), the Competitive Telecommunications Association (CompTel), and Pacific Bell and Nevada Bell (Pacific Companies).

[85] Sprint Comments at 3; Sprint Reply at 2; *see also* CompTel Comments at 2; WilTel Comments at 3; Pacific Companies Reply at 3-5.

[86] WilTel Reply at 2.

[87] *See generally* 47 C.F.R. §§ 61.44, 61.46.

[88] For example, as of July 1, 1994, AT&T's headroom under the PCI in Basket 1 amounted to $1.12 billion on an annualized basis. Under Section 61.46(a) of the rules, when AT&T adjusts a rate, the demand component used to calculate the API remains constant at the base year level. AT&T's headroom is thus calculated based on 1993 demand multiplied by rates as of July 1, 1994 for Basket 1 services. AT&T's True promotions accounted for $893.5 million of this annualized headroom. *See, e.g.*, Letter from Thomas H. Norris, Vice President, Regulatory Affairs, AT&T, to Acting Chief, Common Carrier Bureau, Federal Communications Commission (Aug. 15, 1994).

[89] *See* notes 80, 97, *infra*. 8

[90] *See, e.g.*, Letter from Thomas H. Norris, Vice President, Regulatory Affairs, AT&T, to Acting Chief, Common Carrier Bureau, Federal Communications Commission (Jan.15, 1994).

[91] *See* AT&T Communications Transmittal Nos. 7824, 7832, 7848, Revisions to Tariff F.C.C. No. 1 (December 5, 1994); *see also AT&T Proposes $274 Million in Domestic Price Hikes*, Telecommunications Reports, December 12, 1994, at 41.

[92] AT&T Communications Transmittal No. 7967, Revisions to Tariff F.C.C. No. 1 (Dec. 27, 1994).

[93] *See Trends in Telephone Service* (Industry Analysis Div., released May 1994).

[94] *See Trends in Telephone Service*, at Table 5 (Industry Analysis Div., released Feb. 1995).

[95] *See* Letter of Thomas H. Norris, Vice President, Government Affairs, AT&T, to Chairman, FCC (June 10, 1994) (criticizing use of CPI as indicator of basic schedule rates on grounds that it takes into account only basic schedule rates, and not the offsetting effect of discount plans); Adam Clymer, *As Parties Skirmish Over Budget, Greenspan Offers a Painless Cure*, New York Times, January 11, 1995, at 1, 18 (testimony by Chairman of Federal Reserve Board before joint meeting of House and Senate Budget Committees that the overall CPI exaggerates annual inflation by 0.5 to 1.5 percentage points because ten-year

states that the CPI for interstate toll services, as computed by BLS, overstate the increases in average charges because the CPI sample underweights discount plans and the PPI sample excludes discount plans.[96] It is clear, nonetheless, that the overall increases in basic schedule rates, when compared with the significant discounts in AT&T's True promotions, have created a wide range in prices for Basket 1 residential services. The issue posed below is whether this realignment in prices to residential subscribers in the MTS categories, which are not substantially affected by such price cap mechanisms as the SBI limits and the residential rate index,[97] requires revisions to the price cap system.

### D. *Reclassification of AT&T as a Non-Dominant Carrier*

32. The Commission based its tentative conclusions in the *OCP NPRM* and the *Promotions NPRM* to remove OCPs and promotions from Basket 1 primarily on findings that such treatment would not hinder competition for OCPs and would deter AT&T from using promotions anti-competitively.[98] Since the release of the *OCP NPRM* and the *Promotions NPRM,* however, AT&T has filed a motion requesting that it be reclassified as a nondominant carrier.[99] AT&T argues in its petition that circumstances have changed since the time it was originally classified as a dominant carrier, including the divestiture of the Bell System's bottleneck local facilities and the increase in interexchange carriers, resulting in "thriving" and "robust" interexchange competition.[100]

## III. DISCUSSION

### A. *Commission Goals*

33. The Commission's primary goals in applying price cap regulation to AT&T include ensuring just and reasonable long distance rates for ratepayers, without unreasonable discrimination,[101] as well as promoting the universal availability of such reasonably priced service.[102] Moreover, the Commission's price cap plan for AT&T is intended to afford AT&T the flexibility to adjust prices to approximate more closely marginal costs and to encourage innovation and the introduction of new services.[103] The primary focus of this Further Notice, therefore, is to determine whether the existing price cap plan should be modified to ensure that promotions and Optional Calling Plans (OCPs) advance the Commission's public interest goals. In addition, we seek to adopt a regulatory scheme for promotions and OCPs that will continue to foster greater competitiveness in the interexchange market and to permit us to remove more of AT&T's services from price cap regulation.[104]

34. To these ends, we seek to reduce regulatory burdens on AT&T that do not serve the public interest goals of our price cap planfor AT&T. Moreover, our intention is to provide AT&T with greater flexibility to respond promptly to developments in the interstate interexchange marketplace. We also want to simplify price cap procedures and reduce periods of delay caused by the tariff review process. In addition, we seek to ensure that our price cap scheme for AT&T treats like services in a sensible, consistent manner. Finally, as discussed below, we seek comment on the degree of protection that the price cap plan should afford AT&T subscribers who obtain domestic MTS from basic rate schedules.

35. We tentatively conclude that at the present time these goals would not be served by removing AT&T's current Basket 1 promotions and OCPs from price cap regulation. As discussed below, we tentatively conclude in this Further Notice that Basket 1 domestic MTS promotions, domestic MTS OCPs, and basic schedule MTS offerings exhibit substantial cross-elasticities of demand, and are generally offered to the same class of customers, *i.e.,* residential customers, following the removal of AT&T's commercial services from price cap regulation. The removal of domestic MTS OCPs and promotions from price caps would thus streamline some AT&T offerings of domestic MTS for residential customers and retain price cap regulation for similar offerings to the same class of customers.[105] We decline to take such a step at this time and, contrary to the tentative conclusions of both the *Promotions NPRM* and the *OCP NPRM,* we now tentatively conclude that the issue of further streamlining of OCPs and promotions should be considered together with AT&T's motion for non-dominant

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adjustment period for CPI fails to capture fully such changes as suddenly successful inventions like television sets or the introduction of more sophisticated computers, which reduce prices and enhance efficiency).

[96] *See Trends in Telephone Service,* at Table 5 (Industry Analysis Div., released Feb. 1995).

[97] AT&T is required under current rules to calculate a composite average rate for Basket 1 services purchased by residential customers. This rate may not increase more than one percent relative to the annual percentage change in the Basket 1 PCI. *See* 47 C.F.R. § 61.47(g).

[98] *See* discussion at paras. 12-19 and 23-26 , *supra.*

[99] *See* ,Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, CC Docket 79-252 (filed Sept. 22, 1993). This motion is still pending before the Commission.

[100] *See id.*

[101] *See* 47 U.S.C. §§ 201(b), 202(a). In deciding to establish an incentive-based system of regulation for AT&T, the Commission found in the *AT&T Price Cap Order,* for example, that:

> price cap regulation is a far better regulatory system to employ in an environment in transition to full competition than is rate-of-return . . . . [T]he discipline that competition brings to a carrier's prices can be employed in the design of a price cap system to ensure that rates are just, reasonable, and non-discriminatory.

4 FCC Rcd at 2939-43 (footnotes omitted); *see also Promotions NPRM,* 8 FCC Rcd at 3716.

[102] *See* 47 U.S.C. § 151. In the *AT&T Price Cap Order,* the Commission referenced its adoption of universal service as one of the four primary goals in the access charge proceeding *MTS and WATS Market Structure,* 97 FCC 2d 834, 835 (1984), and reconfirmed its commitment to residential customers in adopting price cap regulation.4 FCC Rcd at 3053-4.

[103] *See id.* at 2922-33.

[104] *See id.*

[105] In our decisions to streamline AT&T's commercial services and outbound business services, we were able to differentiate these services from those services remaining in price caps on the basis of, among other things, the class of customers to whom those services were offered, and the demand elasticities among these classes of customers. *See Commercial Services Price Cap Order,*FCC 95-18 at paras 15, 20-21; *Interexchange Order,* 6 FCC Rcd at 5887-88.

status in a separate proceeding. We believe that the regulatory status of OCPs and promotions should be considered as part of the larger issue raised by AT&T's motion: whether all of the services that currently are included in Basket 1 should be removed from price cap regulation and afforded streamlined regulatory treatment. We invite comment on these tentative conclusions.

**B.** ***Proposed Revisions to the AT&T Price Cap Plan***

36. Having tentatively concluded that neither OCPs nor promotions should be removed from price cap regulation at this time, we now consider whether any modifications to the existing price cap plan would advance our public interest goals more effectively. We seek comment on the tentative conclusions and issues described below.

37. *Definitional Issues.* As discussed in the background section of this Further Notice, no precise definition of promotions has been included in our price cap rules. It is clear, however, that the effects of mass-market promotions were not contemplated when we formulated the baskets and bands that restrict AT&T's pricing practices. Furthermore, although we have defined OCPs, the services covered by this definition are very similar to self-selected promotions in that OCPs offer a discounted alternative to basic schedule MTS. Accordingly, we tentatively conclude that self-selected promotions and OCPs should be treated in the same manner under our price cap rules. We propose to establish a new regulatory category for self-selected promotions and OCPs: "alternative pricing plans" (APPs). The defining characteristic of an APP is that it offers a self-selected alternative, *i.e.,* discounted rate, to domestic MTS or other price cap services provided under basic schedule rates.

38. We also conclude that an APP does not differ from an existing service in the domestic MTS service category, and possibly in the other Basket 1 service categories as well, except in ways related to pricing and terms and conditions affecting pricing. APPs are thus "like" existing domestic MTS services.[106] Although we have previously rejected the notion that only services offering new functional capabilities be treated as "new,"[107] we believe that our rules for the treatment of new services should not apply to APPs, as we discuss below. For example, we propose allowing AT&T to file an APP on a streamlined basis, without cost support, outside of price cap regulation. A streamlined APP would expire automatically 90 days after its effective date unless AT&T would file a transmittal with actual cost and demand revenues for the initial 90-day period, subject to tariff review and approval, to include the APP as a permanent offering under price cap regulation.[108]

39. We also tentatively conclude that alternative pricing plans are, by definition, not restructured services. A restructured service is one that replaces an existing service, whereas an APP offers an alternative to an existing service without replacing it. Moreover, a restructured service is automatically available to anyone who simply uses basic schedule MTS, whereas an APP is available only to an eligible customer who signs up for the service. Under this approach, we would tentatively conclude that services that AT&T currently labels "promotions" that automatically change MTS rates without creating additional options, even if for a limited period or for limited locations, should be treated as restructures, not alternative pricing plans, and should be subject to price cap regulation as soon as the tariff becomes effective.[109] In contrast, an alternative pricing plan, such as any of AT&T's True promotions, does not replace the underlying basic rate, but rather provides an optional discount off the basic rate that a customer can "self-select." We seek comment on these tentative conclusions. We also seek comment on whether our definition of APPs and the proposed rule changes guiding the regulatory treatment of APPs outlined below should be applied to the IMTS and operator/card service categories.

40. *Basket 1 Service Categories.* In light of our decision to remove commercial services from price caps and our tentative conclusions discussed above concerning alternative pricing plans, we believe it is appropriate to examine the existing Basket 1 service categories in order to determine whether any modifications to them are necessary. We tentatively conclude, for the reasons set forth below, that the four existing domestic MTS service categories in Basket 1 – namely, (1) domestic day MTS; (2) domestic evening MTS; (3) domestic night/weekend MTS; and (4) ReachOut America – should be combined as a single service category. If this restructuring were implemented, AT&T's Basket 1 would consist of three service categories: (1) domestic MTS, including all three current time-of-day MTS categories, OCPs in the existing ReachOut America category covering domestic MTS and domestic MTS promotions (in other words, domestic MTS basic schedule services and APPs as discussed above); (2) operator and credit card services; and (3) international MTS.

41. We believe that establishing a single domestic MTS service category to encompass the existing time-of-day MTS service categories as well as APPs will increase AT&T's pricing flexibility and better reflect the realities of the interexchange market. We note, for example, that interstate access rates, which appear to be a major component of AT&T's marginal costs of providing service, are not time-of-day-sensitive[110] and thus do not track pricing differences among AT&T's domestic MTS categories. We also observe

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[106] Services are "like" if they are "functionally equivalent," that is, if a customer perceives that the services perform the same function. *See Ad Hoc Telecommunications Users Com. v. F.C.C.*, 680 F.2d 790, 797 (1982). Services need not be "identical" to be functionally equivalent. In the context of mobile services, for example, the Commission has held that the "principal inquiry" in determining whether two services are functionally equivalent involves "evaluating consumer demand for the service" and "whether changes in price for the service under examination . . . would prompt customers to change from one service to the other." *See* Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1447-48 (1994).

[107] *See AT&T Price Cap Order,* 4 FCC Rcd at 3123 n.1103 (holding that repriced version of already-existing service cannot be considered the same service as the pre-existing one).

[108] *See* discussion at para. 46-57, *infra.*

[109] For example, under the proposed approach, the Cinco de Mayo "promotion," which offers a discounted MTS rate to anyone who calls from the United States to Mexico on May 5th, would be treated as a restructure of MTS rates for a one-day period.

[110] The LECs do not charge access rates according to time of day.

that removal of Basket 1 commercial services from price cap regulation would appear to make our conclusion that residential callers are the predominant users of evening and night/weekend MTS equally applicable to day MTS.[111] There is thus no significant differentiation by class of customer in the three domestic MTS service categories. We seek comment on whether a single domestic MTS category or retention of the day, evening, and night/weekend structure is appropriate.

42. When we first authorized AT&T to offer optional calling plans which met an increased net revenues standard, we recognized the existence of cross-elasticities of demand in switched services, and the importance of information about cross-elasticity of demand in the evaluation of OCPs.[112] Cross-elasticity of demand between basic schedule domestic MTS and AT&T's mass-market True promotions is implicit in the headroom calculations AT&T presents as the result of these promotional offerings; these reductions in the API and relevant SBIs involve revenues "foregone" because of a shift by customers from basic schedule rates to promotional rates in the domestic MTS service categories, within the parameters of stabilized base-year demand.[113] Such evidence of cross-elasticity of demand between the non-discounted domestic MTS basic schedule offerings and the services we have defined above as APPs is not restricted to the regulatory sphere. A recent news article, for example, reported that:

> AT&T . . . saw a huge shift among its own customers toward discount calling plans. Company executives say 53 percent of all minutes of consumer traffic on its network last year were discounted calls, a jump from 33 percent in 1993.[114]

The evidence of cross-elasticity of demand between basic schedule MTS and APPs argues in favor of a finding that these services should be classified within the same service category, much as AT&T's True promotions and basic schedule offerings co-exist at present within the three domestic MTS service categories. We thus tentatively conclude that domestic MTS self-selected promotions and OCPs, *i.e.*, APPs, are sufficiently substitutable with domestic MTS services to warrant their inclusion in a single domestic MTS service category. We seek comment on this tentative conclusion.

43. *Service Category Bands.* The establishment of a single domestic MTS service category would require modifications to the service category bands applicable to the existing residential service categories. The services currently within Basket 1 that would be merged into a single domestic MTS service category -- namely, time-of-day domestic MTS, ReachOut America, and current domestic MTS promotions -- are currently subject to both upward and downward banding limitations.[115] Under the downward banding limitation in the current price cap rules, a Basket 1 rate decrease proposed by AT&T that would result in an overall change in a service category rate that is greater than five (5) percent relative to the change in the price cap index (PCI) does not qualify for streamlined review.[116] Under the upward banding limitation in the current price cap rules, any Basket 1 rate increase proposed by AT&T that results in an overall change in a service category rate that is greater than five (5) percent relative to the change in the PCI, or in the case of the domestic evening MTS and domestic night/weekend MTS service categories, greater than four (4) percent relative to the change in the PCI, does not qualify for streamlined review.[117] Within-band filings are considered to be *prima facie* lawful, and petitioners seeking suspension of such filings are held to a high burden of proof.[118]

44. We tentatively conclude that a four-percent ceiling should be placed on the single domestic MTS service category band. In the *AT&T Price Cap Order*, the Commission imposed a similar four-percentupper limit on the domestic MTS evening and domestic MTS night/weekend service category bands because it found that these categories were "predominantly used by residential callers." The Commission expressed particular concern that there are "a significant number of customers residing in non-equal access, rural areas who have no alternative to turn to should AT&T raise its evening and night/weekend rates."[119] We seek comment whether this reasoning or other reasons for tighter band limits on the domestic MTS category retain their viability. In any event, because we believe that the single domestic MTS service category we propose in this Further Notice will be used predominantly by residential customers, we tentatively conclude that a four-percent upper limit is therefore appropriate. We seek comment on this tentative conclusion.

45. We further propose to modify the existing five-percent floor on Basket 1 services with respect to the proposed single domestic MTS service category. The lower band was created in the price caps scheme to deter AT&T predatory conduct. In the *AT&T Price Cap Order*, the Commission decided to establish a five-percent floor on price decreases within the Basket 1 service categories because it believed that the "threat of predatory pricing is one that is best addressed in a structural manner as part of price cap regulation."[120] The Commission acknowledged that rate decreases below the lower band limits are not evidence of predatory pricing: "such below-band reductions as are possible within the limits of our price cap scheme are more likely to be competitive than predatory."[121] We believe that successful predation, defined as the ability to lower prices below a relevant measure of costs in order to drive competitors from the market, is an unlikely occur-

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[111] *AT&T Price Cap Order*, 4 FCC Rcd at 3060.

[112] *OCP Guidelines Order*, 59 Rad. Reg. 2d (P&F) at 83.

[113] *See, e.g.*, Letter from Charles L. Ward, AT&T to Acting Secretary, Federal Communications Commission, at 3 (April 20, 1994) (". . . the larger historic demand of domestic services [as compared to international services] provides greater price cap credit for rate reductions made in those services.")

[114] Edmund L. Andrews, *No-Holds-Barred Battle for Long-Distance Calls*, New York Times, January 21, 1995, at 48.

[115] *See* Section 61.47 of the Commission's Rules, 47 C.F.R. § 61.47 (adjustments to the service band index; pricing bands).

[116] *See AT&T Price Cap Order*, 4 FCC Rcd at 3056; 47 C.F.R. § 61.49(d).

[117] *See id.* at 3059-60.

[118] *See* Section 1.773 of the Commission's rules, 47 C.F.R. § 1.773.

[119] *See AT&T Price Cap Order*, 4 FCC Rcd at 3059-60.

[120] *See AT&T Price Cap Order*, 4 FCC Rcd at 3056.

[121] *Id.* at 3114.

rence.[122] In the *AT&T Price Cap Order*, the Commission observed that "|p|redatory pricing, though often alleged, is generally uncommon, and proven cases are rare. We have, through the structure of AT&T's service baskets, created conditions under which predation should be as unlikely in the interexchange telecommunications market as it is in the economy generally."[123] We also tentatively conclude that the possibility of predation presents less of a concern in an environment where each of the largest three interexchange carriers offers some form of long distance promotional discount.[124] We therefore propose that prices for the single domestic MTS service category band be allowed to decrease by greater than five percent. We seek comment on whether a 15 percent lower limit on the domestic MTS service category band would be more appropriate while not significantly increasing the likelihood of predatory pricing.

46. *New Services Issues.* In proposing to establish a single domestic MTS service category including the services we have defined above as APPs, we also propose to modify our existing new services rules to clarify that these rules do not apply to APPs. Under our current system, the manner in which AT&T styles a new discounted offering determines whether the price cap new services rules apply to the service. Thus, a new offering classified as an optional calling plan is subject to new services treatment, while essentially the same offering styled as a promotion is not treated as a new service but, instead, as a rate change for an existing service. As explained below, this difference in labels has significant consequences for price index calculations without any sound basis for the differing results ensuing from these calculations. We propose to retain our new services rules for AT&T services that are "new" in all respects, *i.e.*, unlike existing services, but to create new rules to bring new APPs within price cap regulation.

47. As stated in the background section, *supra*, a new service is defined as any filing that expands ratepayers' range of service options within those services subject to price cap regulation.[125] New services may be introduced on 45 days' notice, provided AT&T can demonstrate that the new service will generate a net revenue increase within 24 months after incorporation of the new service into an annual price cap tariff or within 36 months after the effective date, whichever occurs first.[126] To develop the historical data needed to perform index calculations for new services, new services are included in price cap regulation in the first annual price cap tariff filing after completion of the base year in which the new service becomes effective.[127] AT&T does not receive price cap credit for a new service that offers a rate reduction, even after the service is introduced into a price cap basket, because the rate reduction occurred outside of price caps.

48. The current requirements that new services be filed on 45 days' notice, supported by a showing that they will result in a net revenue increase, can severely limit AT&T's ability to respond promptly to new developments in the increasingly competitive marketplace in which it offers its price cap services. We therefore tentatively conclude that we should not apply our new services rules to APPs. Instead, we propose to allow AT&T to file alternative pricing plans initially outside of price caps, as are new services, but on a streamlined basis, *i.e.*, on 14 days' notice, without cost support. As discussed more fully below, we propose to allow AT&T to receive immediate price cap credit for APPs upon the conclusion of a shortened 90-day initial period, as opposed to the current one-year base period for new services.

49. We are concerned that basing PCI, API, and SBI calculations for inclusion of new services into price caps on forecasted, as opposed to actual, data may result in overstated headroom, especially when such forecasts can extend over a period of one year or more. We have also observed that the use of extended forecasts may also allow AT&T to ratchet up forecasted demand by making repetitive filings several times a year. We tentatively conclude that we should avoid the use of demand forecasts that are not based on actual data in connection with the inclusion of APPs into price caps. We also tentatively conclude that AT&T should not be required to delay the inclusion of APPs into Basket 1 for up to 18 months. We believe that allowing AT&T to offer APPs on 14 days' notice and with a shortened 90-day base period will address effectively AT&T's interest in greater streamlining. At the same time, requiring the use of actual demand and cost data upon the conclusion of ninety-day base period should address our concerns regarding the possibility that AT&T may ratchet up its forecasted demand by means of repetitive filings of extended forecasts.

50. We believe that these modified procedures for the introduction of APPs will therefore effectively streamline and preserve the integrity of our price cap rules. We tentatively conclude that this approach would address many of AT&T's concerns about the inflexibility of applying our new services rules to discount service plans, while meeting our concerns about the use of forecasted data in making price caps calculations. We seek comment on these tentative conclusions. We also seek comment as to how the approach to price cap treatment for APPs outlined here should be applied to AT&T existing, on-going promotional

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[122] *See, e.g., Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2587-88 (1993).

[123] *AT&T Price Cap Order* at 3114.

[124] *See* John J. Keeler, *MCI and Sprint Unveil Deep Discounts, New Services in Fresh Fight With AT&T*, Wall Street Journal, January 6, 1995, at A3. In addition, a statement attributed to a Sprint spokeswoman in a recent trade press article regarding a new marketing campaign initiated by long-distance carrier LCI International, for example, indicates that:

> Sprint follows [the] lead of AT&T and MCI in determining and setting rates for [the] consumer market. [The spokeswoman said] "That's our competition and that's who we deal with."

*See LCI Charges Big 3 Long Distance Companies Overcharge by $2 Billion Annuall* y, Communications Daily, January 31, 1995, at 1-2 (quoting Sprint Consumer Services Group spokeswoman Juanita Teas).

[125] *See AT&T Price Cap Reconsideration Order*, 6 FCC Rcd at 666-67.

[126] *See id.*

[127] *See id.; see also* 47 C.F.R. §§ 61.42(g), 61.44(g), 61.46(b), 61.47(b).

offerings which fall within the APP definition we have proposed and are currently under price cap regulation, such as the "True" promotions.

51. We also propose to maintain our current new service rules as they apply to new AT&T price cap offerings that are not APPs. Because such services will presumably be primarily services that are not "like" already-provided services, these services are likely to present cost and demand issues beyond the narrow set of "headroom" issues we address in this Further Notice. We thus believe that we should continue to hold such new services outside of price caps until the first annual price cap tariff filing after completion of the base year in which the new service becomes effective in order to gather complete and comprehensive data on the costs, demand, and revenues associated with such new services before they are placed within a price cap basket and thus affect the demand and revenue factors for that basket.[128] Moreover, when we instituted price cap regulation for AT&T, we recognized that new services can raise complex issues, including discrimination and anticompetitive behavior, which require careful review.[129] Tariffs proposing new services were thus required to be filed on 45 days' notice, with supporting information and data to demonstrate compliance with the requirement that such new services increase net revenues for price cap services.[130] Because we believe that such complex issues may remain of potential great concern at present, AT&T should continue to file tariffs for new services other than APPs on 45 days' notice and to make the showing of increased net revenues for new services currently required under our rules, in order to minimize any risk of unreasonable discrimination, cross-subsidization or anticompetitive behavior.

52. We also seek specific comment on the proper price cap treatment of AT&T's recently introduced 500 service, which appears not to fall within our proposed definition of alternative pricing plans. AT&T filed this offering on 27 days' notice as a streamlined business service, arguing that such treatment was appropriate because the new service was primarily designed for and particularly useful to business customers.[131] In petitioning against the AT&T tariff introducing 500 service, MCI quoted Section 61.58(c)(5) of our Rules, which states, in relevant part: "Tariff filings involving the introduction of a new service within the scope of Section 61.42(g) . . . must be made on at least 45 days' notice."[132] MCI interpreted this rule to encompass all new services tariffs filed by AT&T, and contended that AT&T must adhere to this rule or obtain a waiver for its tariff to be lawful.[133] After the Common Carrier Bureau deferred AT&T's tariff to 45 days' notice and AT&T submitted cost data which it represented met the requirements of Section 61.49(g) of our rules, the service was permitted to take effect without an investigation.[134] The potential ambiguity in our Rules with regard to streamlined versus price cap treatment of new services is of concern to us. With particular relevance to 500 service, we now propose to change our rules to specify that to be subject to streamlined rather than price cap regulation, the projected demand for such new services can include only *de minimis* usage by AT&T's residential subscribers, (*i.e.*, less than five percent of overall projected demand within the net revenue test period set forth in Section 61.49(g)(1)). We seek comment on these tentative conclusions and proposals.

53. We accordingly propose to change our new service rules to allow AT&T to file all new APPs on a streamlined basis, *i.e.*, on 14 days' notice, without cost data, provided that the APPS are scheduled to expire automatically no later than 90 days after the initial effective date. The APPs will be kept outside of price caps during this period; we will not allow AT&T price cap credit for these new APPs. On the last business day of the 90-day period, AT&T may extend the expiration date of the APP for 30 days in order to permit the conversion of the APP as a permanent offering under price caps. These revisions would allow AT&T to continue to provide the APP outside of price caps for the extended period. Within this thirty-day period, AT&T would be required to submit tariff revisions on not less than 14 days' notice. The new tariff pages would remove the expiration date and would be accompanied by supporting information required to include the service under price caps. If a longer period is required for review of the tariff filing by the Common Carrier Bureau, AT&T would be required to defer tariff revisions introducing the permanent offering for a period not to exceed 120 days. AT&T would also be permitted to extend the termination of the APP during this period. In this way, AT&T would be able to avoid any interruption in its offering of discounted rates, pending completion of the Bureau's review of the permanent offering.

54. We caution that we will not allow AT&T to evade the 90-day expiration period for new APPs held outside of price caps by making insubstantial changes to the rates, terms and conditions of such APPs and reintroducing them through such tariff revisions as "new" APPs. We will consider all relevant indicia in our tariff review process as to whether APPs are indeed new offerings, including branding, trademarks, AT&T's identification of APPs to consumers, and other marketing and marketplace factors.

55. The tariff revisions that propose to include the APP under price caps would be subject to the provisions of Section 61.49 of our Rules. These revisions would be supported by actual demand figures from the 90-day period that the initial APP filing was effective. The rates, terms and conditions of the APP to be subject to price caps may not differ in any material respect from the rates, terms and conditions of the APP as originally introduced outside of price caps. We would allow AT&T immediate index credit on the date that the tariff revisions placing the APP under

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[128] *See* 47 C.F.R. § 61.44(g) (exogenous cost changes to PCI attributable to new services); 47 C.F.R. § 61.46(b) (adjustments to demand weighting used in API calculations); and § 61.47(b) (adjustments to demand weighting used in SBI calculations).

[129] *See AT&T Price Cap Order*, 4 FCC Rcd at 3122.

[130] *Id.* at 3123-24; *see also id.* at 3127-28 (rejecting AT&T proposal that we apply streamlined tariff review to new services).

[131] *See* AT&T Communications Transmittal No.7698, 10 FCC Rcd 900 (1994) (*"Transmittal 7698 Order"*).

[132] 47 C.F.R. § 61.58(c)(5).

[133] MCI Petition To Reject Or, In The Alternative, To Suspend And Investigate, AT&T Communications Transmittal No. 7698 (filed Nov. 10, 1994).

[134] *Transmittal 7698 Order*, 10 FCC Rcd at 900-01.

price caps take effect, based on its representation of the annualized actual demand for the APP, as well as any exogenous cost changes that may relate to the APP.[135]

56. We also propose to require AT&T to file quarterly "true-up" reports, *i.e.*, quarterly updates of actual demand figures, during the initial year that the new APP is incorporated into price caps, in order to refine its calculations of the headroom created by the offering. We would allow AT&T to file rate changes to the new APP during the first year of price cap regulation by means of a tariff transmittal, giving 14 days' notice of such changes, but any change in price cap indices would have to filed on 45 days' notice and based on historical demand data such as AT&T would be required to file with the quarterly true-up report.

57. We thus propose changes to Sections 61.3, 61.43-.44, 61.46-.47, 61.49 and 61.58 of our Rules to permit streamlined treatment for new APPs. We believe that requiring AT&T to use historical demand, as required for other types of rate changes under our current price cap rules, will eliminate the creation of headroom based on demand projections for promotions. Any increases in the basic schedule rates, therefore, will be based on actual revenue balancing, not merely on forecasts of revenue stream, thus providing stability for basic schedule ratepayers and for AT&T. AT&T will also benefit from the increased flexibility to file "initially streamlined" APPs and to receive nearly immediate index credit for those APPs filed on a permanent basis after the initial 90-day period. The Common Carrier Bureau would also retain the ability to defer APP tariff filings, either upon the initial filing or upon the price cap filing after the initial 90-day period, if additional information or review is required, and to suspend or reject such filings based on applicable legal standards.

### C. *Limitations on Rate Increases for Basic MTS*

58. As discussed above in the background section of this Further Notice, AT&T's creation of price cap "headroom" through discounted offerings has permitted it to increase it's basic schedule rates for domestic MTS. We ask here whether such basic schedule rate increases implicate our statutory and policy goals, pursued through price cap regulation, of just and reasonable rates, without unreasonable discrimination, and universal availability of such reasonably priced service. AT&T has asserted that its increases for basic schedule rates are reasonable. We seek comment on this matter generally and on the specific issues discussed below.

59. As a threshold matter, we seek comment on the significance of the AT&T basic rate schedule for domestic MTS relative to other rates offered for domestic MTS in the interexchange marketplace. We note, for example, that many of AT&T's discounted offerings, such as the True promotions, are framed in terms of percentage discounts off the basic rate schedule at various usage levels. We also seek comment on the relationship of AT&T's basic rate to the basic rates of its competitors.

60. Commenters should discuss whether, and, if so, how our public policy goals, such as the achievement of reasonably nondiscriminatory, cost-based rates or the promotion of universal service, should affect our regulatory treatment of Basket 1 domestic MTS. We address specific issues relating to discrimination and the cost basis for AT&T's rates below. We also seek comment as to whether universal service concerns are implicated in our regulation of AT&T's basic rates. Although "universal service" is most generally regarded as a goal pursued through the widespread availability of reasonably priced local telephone service, some have advocated that this goal should be expanded to include services made available through a more technologically advanced communications infrastructure. We recognize that Section 1 of the Communications Act, usually regarded as the locus of the universal service mandate, requires us to regulate so as "to make available, so far as possible, *to all the people of the United States*, a rapid, efficient, *Nation-wide, and world-wide* wire and radio communication service with adequate facilities *at reasonable charges*, . . . ."[136] We seek comment' on what level of scrutiny this statutory mandate requires us to undertake with respect to the basic schedule offerings of the dominant interexchange carrier.

61. We also seek comment on whether the availability of local telephone service is affected by increases in AT&T's basic schedule rates for interstate MTS. We note, for example, that studies indicate that the majority of those without telephone service once were subscribers, but have been disconnected for nonpayment of toll charges.[137] We seek comment on the relationship, if any, of increased basic schedule service rates for domestic MTS with the disconnection of local telephone subscribers due to nonpayment of toll charges.

62. AT&T states that it typically does not recover the incremental costs of providing service to its "low-volume" basic schedule customers, while its price structure for its "high-volume" customers has normally exceeded the incremental costs of providing residential long-distance service to them.[138] According to AT&T, the provision of mass-market discounts, such as the True promotions, to high-volume customers and increases in rates for low-volume customers are justified as a means of rebalancing prices with costs.[139] Commenters should discuss the validity of AT&T's arguments regarding cost recovery for serving "low-volume" customers of basic schedule offerings vis-

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[135] By "annualized" demand, we mean that AT&T would be able to apply demand figures gained from the initial 90-day period by adjusting this actual demand data to correspond to the base year demand used in calculating the API and SBIs. For example, data for the full 90 days would multiplied by a factor of 4.05 to calculate the "annual" headroom effect of the APPs' discounted rates.

[136] 47 U.S.C. § 151 (emphasis added).

[137] *See* Field Research Corp., *Affordability of Telephone Service, Vol. I, Non-Customer Survey*, for GTE/Pacific Bell (Oct. 1993); *Chesapeake and Potomac Telephone Co.'s Submission of Telephone Penetration Studies*, Docket 850 (D.C. Pub. Service Comm'n., Oct. 1993).

[138] *See* Peter K. Pitsch, *A Brief History of Competition in the Long Distance Communications Market*, at 15-22, attached to Letter from Charles L. Ward, Government Affairs Director, AT&T, to Chief Economist, Office of Plans & Policy, Federal Communications Commission, *submitted in* CC Docket 79-252 (Sept. 22, 1994); *see also* Letter from Charles L. Ward to Federal Communications Commission, (April 20, 1994), *supra* at note 110.

[139] *See* Letter from Charles L. Ward, AT&T, to Acting Secretary, Federal Communications Commission, submitted in CC Docket 79-252 (April 20, 1994).

a-vis cost recovery for serving "high-volume" customers of discounted offerings, and the degree to which "low-volume" customers experience periods of higher-volume usage which can offset the costs of providing low volume service in other periods. We also seek comment on the extent to which the Communications Act's protections against unreasonable discrimination are implicated by the cost issues we raise here, *i.e.*, if rate differences between AT&T's basic schedule services and its discounted offerings reflect a wider variation than corresponding cost differences, at what point do such rate variations become unreasonable?

63. We seek comment on the relative availability of AT&T discounted offerings as compared to domestic MTS offered at basic rates. If AT&T's discounted offerings are unavailable to a significant body of residential customers, then AT&T's increases in basic rates to these customers may extend well beyond any AT&T need to recover costs and may demonstrate a public interest need to curb unrestricted rate increases. To what extent are AT&T's discounted offerings available to "high-volume" residential subscribers where the advanced billing techniques upon which these offerings rely may not be readily available? Such a lack of availability could occur in rural areas served by independent telephone companies, and areas where "equal access" to interexchange carriers has not been implemented. What proportion of AT&T's residential customers are located in such areas are thus affected?

64. We seek comment on whether we should adopt one of the two following options that will afford varying measures of protection against basic schedule rate increases. First, we seek comment on creating a basic rate index to replace the residential index in Basket 1. The residential PCI was created as a subindex of the Basket 1 total PCI, and was calculated for revenue for all the services in Basket 1. It created a separate cap on the amount that residential services in Basket 1 could increase each year.[140] The purpose of the residential PCI was to protect residential services against price increases which would offset price decreases for commercial service. The recent streamlining of commercial services, however, renders this function obsolete. Thus, we propose to delete the residential PCI from our rules.

65. In place of the residential index, we propose creating a basic rate index, similar in operation to the residential index, which would govern increases in basic domestic MTS service rates to a given percentage per year.[141] We tentatively conclude that this percentage should be set at 5 percent, that is, AT&T would not be able to increase basic rates by a margin of more than 5 percent per year in relation to the Basket 1 PCI. We select 5 percent because it is a reasonably restrained application of indexed increases in AT&T's basic toll rates in recent years,[142] and reflects as well the general limitation we have placed on the pricing flexibility in price caps service categories.[143] We seek comment on these conclusions and proposals.

66. As an alternative to adopting our above proposed basic rate index to protect basic MTS rates, we seek comment on adopting AT&T's "safety net" proposal. AT&T has proposed an option that is predicated on the market for Basket 1 services being segmented among discrete classes of customers.[144] AT&T requests that the Commission reclassify AT&T as a non-dominant carrier. In return, AT&T states that it will provide low-income and low-volume consumers with a "safety net" of low-usage service plans. This plan would consist of two services: one targeted for low-income users, the other available to all consumers but intended to benefit low-volume users. Prices would remain fixed until 1998. This option offers a measure of built-in protection for low-income and low-volume users. AT&T bases its proposal on its assertion that "[t]here is overwhelming evidence that the current state of competition in this market fully support[s] the reclassification of AT&T as non-dominant . . . ."[145]

67. We seek comment on this option generally and whether such an approach is feasible and desirable without reclassification of AT&T as a non-dominant carrier.[146] We also seek comment on the appropriate price levels for low-income and low-volume users, respectively. We further seek comment as to the period that such price levels should remain fixed and what approach would replace this mechanism after the expiration date.

**D. *Exogenous Costs Issues.***

68. All carriers subject to price cap regulation file adjustments to the PCI at the annual price cap tariff filing and maintain updated PCIs to reflect the effect of midyear access and exogenous cost changes. Exogenous costs are costs that change due to changes in laws, regulations, or rules, or other administrative, legislative, or judicial changes beyond a carrier's control and not reflected elsewhere in the price cap formula.[147] Carriers calculate these adjustments using the price cap formulas set forthin our rules. [148] Exogenous costs are represented by the "z factor."[149] In addition, the price cap formula applied to AT&T includes a "y factor," which allocates AT&T's access costs among all capped services in AT&T's price cap baskets.[150] Changes in access costs are treated as exogenous costs for AT&T.

69. When it adopted the AT&T price cap plan in 1989, the Commission determined that exogenous costs should result in an adjustment to the PCI to ensure that the price cap formula does not lead to unreasonably high or low

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140 *See AT&T Price Cap Order*, 4 FCC Rcd at 3052-53.

141 In calculating the basic rate index, we would require AT&T to utilize its non-discounted basic rates and exclude any discounts based on volume, term, "loyalty" (length of service), "win-back" (change from another carrier's service), or other factors, even if these discounts are offered on an automatic, non-"self-selecting" basis.

142 *See* para. 36-37, *supra*, for a discussion of recent increases in AT&T's basic rates.

143 *See* 47 C.F.R. § 61.47(e)(1).

144 Letter of Alex Mandl, AT&T, to the Chairman, Federal Communications Commission, dated October 4, 1994.

145 *Id.*

146 We note, for example, that the *OCP Guidelines Order* permitted a dominant carrier to offer service with minimum monthly charges "as long as it also makes available unbundled basic MTS offerings." *OCP Guidelines Order*,59 Rad. Reg. 2d (P&F) at 89.

147 *Further Notice*, 3 FCC Rcd at 3383 n.738.

148 *See* 47 C.F.R. §§ 61.44-61.45.

149 *See id.* §§ 61.44(c), 61.45(d).

150 *Id.* §§ 61.44(d)-(h).

rates.[151] We recently revised our rules for local exchange carriers (LECs) in the *LEC Price Cap Performance Review Report and Order*[152] to change the exogenous cost rules applicable to accounting changes. Exogenous treatment is now permitted only for those accounting changes that result in economic cost changes, *i.e.*, that affect the discounted cash flow of the LEC. We concluded that most accounting changes, generally, will have no direct impact on the cash flow choices available to LECs because financial accounting charges are designed primarily to give the financial markets a more accurate portrayal of the financial health of the corporation, and not necessarily to make the company behave differently.[153] We also concluded that adopting this economic cost standard will narrow the exception that exogenous cost treatment represents to the general principle that, under price caps, cost changes do not flow directly into rate changes.[154] We ordered the LECs to adjust their PCIs to exclude prospectively any accounting cost changes currently reflected there for which carriers did not incur an economic cost,[155] for example, the changes in accounting for costs of employee post-retirement benefits other than pensions (commonly know as "other post-retirement employee benefits" or "OPEBs") that are engendered by the Financial Accounting Standards Board's (FASB's) Statement ofp Financial Accounting Standards-106 (SFAS-106)[156] and Statement of Financial Accounting Standards-112 (SFAS-112).[157]

70. We tentatively conclude that we should adopt the same treatment for exogenous costs for AT&T as we adopted for LECs in the *LEC Price Cap Performance Review Report and Order*. We seek comment on this tentative conclusion. We also seek comment on whether differences between AT&T and the LECs justify the adoption of different rules governing the eligibility for exogenous treatment of costs resulting from changes in accounting procedures, and, if so, what these rules should be.

## IV. COMMENTS: PROCEDURAL RULES

71. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Sections 1.1202, 1.1203, and 1.1206(a) of the Commission's Rules, 47 C.F.R. §§ 1.1202, 1.203, and 1.1206(a).

72. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments in this proceeding on or before July 3, 1995, and reply comments on or before July 24, 1995. All relevant and timely comments will be considered by this Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

73. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and 11 copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) at its headquarters at 1919 M Street, N.W., Washington, D.C.

74. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), does not apply to this rulemaking proceeding because if promulgated, it would not have a significant economic impact on a substantial number of small entities. Although we do not find that the Regulatory Flexibility Act is applicable to this proceeding, this Commission has an ongoing concern with the effect of its rules and regulation on small business and the customers of the regulated carriers. The Secretary shall send a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq* (1981).

## V. ORDERING CLAUSE

75. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201-205, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 303(r), 403, NOTICE IS HEREBY GIVEN of proposed amendments to Part 61, and Sections 61.3, 61.43-.44, 61.46-.47, 61.49 and 61.58, in accordance with the proposals, discussions, and statement of issues in this Further Notice of Proposed rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[151] *AT&T Price Cap Order*, 4 FCC Rcd at 3002-03, 3017-18.

[152] Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, FCC 95-132, (rel. April 7, 1995), (*LEC Price Cap Performance Review Report and Order*), at paras. 292-320.

[153] *Id.* at para. 306.

[154] *Id.* at paras. 294-96.

[155] *Id.* at paras. 307-10.

[156] SFAS-106 requires companies to account for OPEBs on an accrual basis beginning December 15, 1992. SFAS-106 also requires companies to book the previously unaccrued OPEB amounts for retirees and active employees as of the date that the company adopts SFAS-106. *See id.* at para. 276.

[157] SFAS-112 requires companies to account for such post-employment benefits on an accrual basis beginning December 15, 1993. The Common Carrier Bureau required the LECs to adopt SFAS-112 for regulatory accounting purposes no later than January 1, 1994. Bell Atlantic has sought exogenous treatment of its SFAS-112 costs. *See id.* at para. 277.

## APPENDIX A

*Proposed Amendments to the Code of Federal Regulations*

**PART 61 -- TARIFFS**

1. The authority citation for Part 61 continues to read as follows:

AUTHORITY: Secs. 1, 4(i), 4(j), 201-205, and 403 of the Communications Act of 1934, as amended; 47 U.S.C. 151, 154(i), 154(j), 201-205, and 403, unless otherwise noted.

2. Section 61.3 is amended by redesignating paragraphs (c) through (mm) as paragraphs (d) through (nn), and adding new paragraph (c) to read as follows:

**§ 61.3 Definitions.**

* * * * *

§§ 61.3(c) through (ll) are redesignated as follows:

| Old section | New section |
|---|---|
| 61.3(c) | 61.3(d) |
| 61.3(d) | 61.3(e) |
| 61.3(e) | 61.3(f) |
| 61.3(f) | 61.3(g) |
| 61.3(g) | 61.3(h) |
| 61.3(h) | 61.3(i) |
| 61.3(i) | 61.3(j) |
| 61.3(j) | 61.3(k) |
| 61.3(k) | 61.3(l) |
| 61.3(l) | 61.3(m) |
| 61.3(m) | 61.3(n) |
| 61.3(n) | 61.3(o) |
| 61.3(o) | 61.3(p) |
| 61.3(p) | 61.3(q) |
| 61.3(q) | 61.3(r) |
| 61.3(r) | 61.3(s) |
| 61.3(s) | 61.3(t) |
| 61.3(t) | 61.3(u) |
| 61.3(u) | 61.3(v) |
| 61.3(v) | 61.3(w) |
| 61.3(w) | 61.3(x) |
| 61.3(x) | 61.3(y) |
| 61.3(y) | 61.3(z) |
| 61.3(z) | 61.3(aa) |
| 61.3(aa) | 61.3(bb) |
| 61.3(bb) | 61.3(cc) |
| 61.3(cc) | 61.3(dd) |
| 61.3(dd) | 61.3(ee) |
| 61.3(ee) | 61.3(ff) |
| 61.3(ff) | 61.3(gg) |
| 61.3(gg) | 61.3(hh) |
| 61.3(hh) | 61.3(ii) |
| 61.3(ii) | 61.3(jj) |
| 61.3(jj) | 61.3(kk) |
| 61.3(kk) | 61.3(ll) |
| 61.3(ll) | 61.3(mm) |
| 61.3(mm) | 61.3(nn) |

* * * * *

(c) Alternative Pricing Plan (APP). Any deviation from the basic schedule rates for domestic MTS offered on an optional basis by an interexchange carrier subject to price cap regulation pursuant to § 61.41(a)(1) to an eligible customer who enrolls for the service.

* * * * *

3. Section 61.42 is amended by revising paragraph (b)(1)(i) through (vi) to read as follows:

**§ 61.42 Price cap baskets and service categories.**

* * * * *

(b) * * *

(1) * * *

(i) Domestic MTS;

(ii) International MTS; and

(iii) Operator and credit card services.

* * * * *

4. Section 61.43 is amended by revising the section to read as follows:

**§ 61.43 Annual price cap filings required.**

Carriers subject to price cap regulation shall submit annual price cap tariff filings that propose rates for the upcoming year, that make appropriate adjustments to their PCI, API, and SBI values pursuant to §§ 61.44 through 61.47, that incorporate the costs and rates of new services and APPs into the PCI, API, or SBI calculations pursuant to §§ 61.44(g), 61.45(g), 61.46(b) and (c), and 61.47(b) through (d). * * *

5. Section 61.44 is amended by revising paragraph (c) to read as (follows:

**§ 61.44 Adjustments to the PCI for Dominant Interexchange Carriers.**

(c) The exogenous cost changes represented by the term "Z" in the formula detailed in paragraph (b) of this section shall be limited to those cost changes that the Commission shall permit or require by rule, rule waiver, or declaratory ruling, and include those caused by :

* * * * *

(2) Such changes in the Uniform System of Accounts, including changes in the Uniform System of Accounts requirements made pursuant to § 32.16, as the Commission shall permit or require be treated as exogenous by rule, rule waiver, or declaratory ruling.

* * * * *

(5) Such tax law changes and other extraordinary cost changes as the Commission shall permit or require be treated as exogenous by rule, rule waiver, or declaratory ruling.

* * * * *

6. Section 61.46 is amended by redesignating paragraphs (c) through (f) as paragraphs (d) through (g), and adding new paragraph (c) to read as follows:

**§ 61.46 Adjustments to the API.**

* * * * *

§ 61.46 is redesignated as follows:

| Old section | New section |
|---|---|
| (c) | (d) |
| (d) | (e) |
| (e) | (f) |
| (f) | (g) |

* * * * *

(c) APPs, as defined in § 61.3(c), must be included in the appropriate API calculations under paragraph (a) of this section beginning at the date that the tariff revisions placing the APP under price cap regulation take effect, and quarterly thereafter until the annual price cap filing made pursuant to § 61.43 before which the APP has been effective for the full base year. This index adjustment requires that the demand for the APP during the initial 90-day period and each quarterly period during the period before the annual price cap filing made pursuant to § 61.43 before which the APP has been effective for the full base year must be included in determining the revenues used in calculating the API.

* * * * *

7. Section 61.47 is amended by redesignating paragraphs (d) through (h) as paragraphs (e) through (i), adding new paragraph (d), and revising paragraph (g) to read as follows:

**§ 61.47 Adjustments to the SBI; pricing bands.**

* * * * *

§ 61.47 is redesignated as follows:

| Old section | New section |
|---|---|
| (d) | (e) |
| (e) | (f) |
| (f) | (g) |
| (g) | (h) |
| (h) | (i) |

* * * * *

(d) APPs, as defined in § 61.3(c), must be included in the appropriate SBI calculations under paragraph (a) of this section beginning at the date that the tariff revisions placing the APP under price cap regulation take effect, and quarterly thereafter until the annual price cap filing made pursuant to § 61.43 before which the APP has been effective for the full base year. This index adjustment requires that the demand for the APP during the base period and each quarterly period during the period before the annual price cap filing made pursuant to § 61.43 before which the APP has been effective for the full base year must be included in determining the revenues used in calculating the SBI.

* * * * *

(g) * * *

(1) The pricing bands for the domestic MTS service category shall limit the annual upward pricing flexibility for that service category, as reflected in its SBI, to four percent, and the annual downward pricing flexibility to 15 percent, relative to the percentage change in the PCI for the residential services basket, measured from the last day of the preceding tariff year.

(2) Dominant interexchange carriers subject to price cap regulation shall calculate a composite basic rate for undiscounted domestic MTS service contained in the residential services basket. Notwithstanding paragraph (g)(1) of this section, the annual upward pricing flexibility for this composite rate shall be limited to five percent, relative to the percentage change in the PCI for the residential services basket, measured from the last day of the preceding tariff year.

8. Section 61.49 is amended by revising paragraphs (c), (d), and (g)(1) and adding paragraph (g)(3) to reads as follows:

**§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.**

* * * * *

(c) Each price cap tariff filing that proposes rates above the applicable band limits established in §§ 61.47(f), (g)(1), (h) and (i) or above the limit on the basic rate for undiscounted domestic MTS established in § 61.47(g)(2) must be accompanied by supporting materials establishing substantial cause for the proposed rates.

(d) Each price cap filing that proposes service category rates below applicable band limits established in § 61.47(f), (g)(1), (h) and (i) of this part must be accompanied by supporting material establishing that the rates cover the service category's average variable cost, or equivalently, that the service category's net additional revenue resulting from the price change exceeds additional costs.

* * * * *

(g) * * *

(1) A new service introduced by a dominant interexchange carrier's tariff filing is subject to price cap regulation when the projected demand for such new service includes more than *de minimis* usage by subscribers to the services described in § 61.42(b)(1), *i.e.*, when such projected usage constitutes more than five percent of overall projected demand within the net revenue test period set forth in this paragraph. * * *

(2) * * *

(3) Accompanying demand and revenue data is not required for tariffs introducing an APP, as defined in § 61.3(c), filed on an initial streamlined basis. Tariff revisions placing APPs under price cap regulation must be accompanied by actual demand and revenue data for the 90-day period that the initial APP filing was effective.

* * * *

9. Section 61.58 is amended by revising paragraph (c)(3) and adding new paragraph (c)(8) to read as follows:

**§ 61.58 Notice requirements.**

* * * * *

(c) * * *

(3) Tariff filings that will cause any API to exceed its applicable PCI pursuant to calculations provided for in § 61.46 of this part, that will cause any SBI to exceed its upper banding limitations established in §§ 61.47(f), (g)(1), (h), and (i) of this part, or that will cause the basic schedule domestic MTS rate to exceed its limitation on upward pricing flexibility established in § 61.47(g)(2) of this part, must be made on at least 120 days' notice, or such other maximum period of notice permitted by section 203(b) of the Communications Act, regardless of whether petitions under § 1.773 of the Commission's Rules have been filed.

* * * * *

(8) Tariff filings for APPs, as defined in § 61.3(c), that are initially filed on a streamlined basis must be made on at least 14 days' notice. Tariff filings to extend the initial 90-day effective period of an APP that was filed on a streamlined basis for an additional maximum of 30 days must be filed on at least one day's notice, *i.e.*, no later than the 89th day, or the last business day, whichever is earlier, of the initial 90-day effective period. Tariff filings that remove the expiration date of an APP initially filed on a streamlined basis and place the APP under price cap regulation must be filed on at least fourteen days' notice, to become effective no later than 120 days from the date the APP initially was filed on a streamlined basis.

* * * * *

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 94-103**

In the Matter of

Petition on Behalf of the State of Hawaii,
Public Utility Commission, for Authority
To Extend Its Rate Regulation of Commercial
Mobile Radio Services in the State of Hawaii

**REPORT AND ORDER**

**Adopted: May 4, 1995; Released: May 19, 1995**

By the Commission:

## I. INTRODUCTION

1. On August 8, 1994, the Public Utilities Commission of Hawaii (hereinafter "Hawaii" or "HPUC"), on behalf of that state, petitioned us to retain state regulatory authority over the rates for intrastate commercial mobile radio services ("CMRS").[1] Thirteen parties filed pleadings opposing the petition, and one party filed a pleading supporting it.[2] By this action, we deny the petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

## II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.[3] Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;[4] (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;[5] and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.[6]

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of CMRS.[7] As an exception to this general rule, Congress also provided that, if a State had "any regulation" concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone landline exchange service within such State."[8]

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state seeking to retain regulatory authority must "clear substantial hurdles" in demonstrating that continued regulation is warranted.[9] We also determined that the nature of a state's burden of proof is delineated generally by the statute itself. Specifically, we found that:[10]

> [I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [*sic*] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity.

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[1] Hawaii Public Utility Commission Petition, on Behalf of the State of Hawaii, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, PR Docket No. 94-103, filed Aug. 8, 1994 ("Hawaii Petition").

[2] A list of parties that filed pleadings in this proceeding appears at Appendix A.

[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

[4] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (1994) (*CMRS Second Report and Order), reconsideration pending.*

[5] National Telecommunications and Information Administration Organization Act, § 113(b)(1).q

[6] The competitive bidding methodology is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays ...." 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

[7] *See* 47 U.S.C. § 332(c)(3)(A).

[8] *See* 47 U.S.C. § 332(c)(3)(B).

[9] *See CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[10] *Id.*, 9 FCC Rcd at 1421.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be grounded on demonstrable evidence.[11] In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be pertinent and helpful to our consideration of a state petition.[12] Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.[13] We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.[14] In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising Federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."[15] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

## III. DECISIONAL FRAMEWORK

6. In order to prevail on the merits, the HPUC must sustain its statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[16] A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties' debate in this record. As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state's petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service[17] have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

7. Since the Budget Act does not explicitly construe or elaborate on the phrase "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory," we look to the "design of the statute as a whole and its object and policy" to give that phrase meaning.[18] We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also speak of just and reasonable rates.[19] We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive market operations.[20] The more formal description, however, is whether rates fall within a "zone of reasonableness" that is bounded at one end by the "investor interest in maintaining financial integrity and access to capital markets" and at the other by the "consumer interest in being charged non-exploitative rates."[21] Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by reference to carriers' costs and earnings,[22] but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.[23] These principles define basic components of a state's demonstration under

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[11] *Id.*, 9 FCC Rcd at 1504.

[12] 47 C.F.R. § 20.13.

[13] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505.

[14] Under *Louisiana PSC*, the Commission may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana Pub. Ser. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the State regulation thwarts or impedes a valid Federal policy. *See* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); National Ass'n of Reg. Util. Comm ners v FCC, 880 F.2d 422 (D.C. Cir. 1989).

[15] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

[16] 47 U.S.C. § 332(c)(3).

[17] Although the provisions of Section 332(c)(3) of the Act apply to rate or entry regulation in the case of any commercial mobile radio service provider, the HPUC Petition is oriented to the provision of cellular service.

[18] *See* Crandon v. United States, 494 U.S. 152, 157 (1990); McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[19] *See* 47 U.S.C. § 201; *see also* 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

[20] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886 (para. 25), 2889-2900 (1989); *see also* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.

[21] *See, e.g.*, FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988); *see also* FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

[22] *See* FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs.") (citation omitted); *see also* Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05, *reh'g denied*, Bass v. FPC, 392 U.S. 917 (1968) (upholding ratemaking based upon area-wide average costs).

[23] *See, e.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

> Mobil's argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional non-cost incentives on the evidence of a need for increased supplies.

Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a "zone of reasonableness," which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

8. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: "no State ... shall have any authority to regulate" CMRS rates..[24] As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) ("State Preemption"), express an unambiguous congressional intent to foreclose state regulation in the first instance.[25] Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation,[26] and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.[27]

9. Unlike some of the opponents of the HPUC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;[28] (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed "rapidly" through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal of stimulating economic opportunity and competition;[29] and (3) in contemplation of the deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.[30]

10. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving,[31] and it provided the resources (*e.g.*, additional spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.[32] Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.[33]

11. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of "market conditions" in the context of Section 332(c)(3) necessarily is governed by that framework.

12. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that Hawaii, or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Com-

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*Id.* at 316. *See also* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); Public Service Comm'n of New York v. FERC, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

[24] 47 U.S.C. § 332(c)(3)..

[25] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[26] 47 U.S.C. § 332(c)(1)(A).

[27] 47 U.S.C. § 332(c)(1)(C).

[28] OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

[29] *See* OBRA § 6002(a), amending Section 309 of the Communications Act.

[30] *See* 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

[31] The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. *See* Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international allocations decision making fora that recognized and permitted the use of such spectrum for PCS and other emerging technologies on a global scale. *See* Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. *See* OBRA § 6002(d)(2)(B).

[32] *See CMRS Second Report and Order*, 9 FCC Rcd at 1421; *see also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

[33] *Id.*

mission established the two-carrier cellular market structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities."[34] Other Federal agencies have taken similar positions.[35] One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that "[w]hile GAO found no evidence of anticompetitive or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."[36] It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly prohibited state regulation of CMRS.[37] Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.[38]

13. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.[39] For example, we have attempted to heighten cellular competition at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between the two licensees in each local market.[40] We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.[41] Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

14. The framework of our CMRS regulatory policy -- moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by regulating existing licensees -- aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.[42] As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,[43] not a policy that is balkanized state-by-state.

15. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work. With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:[44]

> [i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

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[34] *See, e.g.*, Cellular Communications Systems, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

[35] *See* Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 ([T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]"); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 ("[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market."), 10-12.

[36] United States General Accounting Office, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," GAO/RCED-92-220 (July 1992) (GAO Report).

[37] *Cf.* Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord* Miles v. Apex Marine Corporation, 489 U.S. 19 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Minneapolis & St. Louis Railway Co. v. United States, 361 U.S. 173 (1959).

[38] *Cf.* McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

[39] *See, e.g.*, GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. *See* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

[40] *See Cellular Resale Order*, 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry)*, Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

[41] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

[42] If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

[43] See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

> [B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

[44] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

16. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impossible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that Congress would have established two separate statutory procedures -- one to govern our forbearance, and another to govern states' petitions[45] -- if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

17. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,[46] and such conditions can produce good results for consumers.[47] In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

18. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to perform a Structure-Conduct-Performance ("SCP") analysis,[48] which is a standard paradigm of modern industrial organization analysis.[49] This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the number of competitors, the cost structure, and the degree of integration1with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry structure and allows us to determine whether and how consumer interests are being served by such activity.

19. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce "specific allegations of fact," to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding "anticompetitive or discriminatory practices or behavior by commercial mobile radio service providers."[50] We also requested "[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces," and we indicated that we would consider such evidence "especially probative."[51]

20. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,[52] and "an assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state."[53] We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.[54] In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on "trends" in each commercial radio provider's rates and customer base[55] and on "opportunities for new providers to enter into the provision of competing services" as well as "an analysis of any barriers to such entry."[56] In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they see fit,[57] the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

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[45] *See* 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

[46] In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. *See* D. Carlton & J. Perloff, Modern Industrial Organization 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

[47] *See, e.g.*, W. Baumol, J. Panzar & R. Willig, Contestable Markets and the Theory of Industry Structure 15-46 (1982).

[48] Section 20.13(a)(1) requires states to include "demonstrative evidence" establishing failed market conditions. *See* 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. *See* 47 C.F.R. § 20.13(a)(2)(vi).

[49] *See, e.g.*, F. Scherer & D. Ross, Industrial Market Structure and Economic Performance, 4-7 (3d ed. 1990) ("Scherer and Ross"); D. Carlton & J. Perloff, Modern Industrial Organization, chs. 1, 9 (2d ed. 1994); J. Tirole, The Theory of Industrial Organization 1-3 (1988).

[50] 47 C.F.R. § 20.13(a)(2)(vi).

[51] 47 C.F.R. § 20.13(a)(2)(vii).

[52] 47 C.F.R. § 20.13(a)(2)(i) and (ii).

[53] 47 C.F.R. § 20.13(a)(2)(iv).

[54] 47 C.F.R. § 20.13(a)(2)(viii).

[55] 47 C.F.R. § 20.13(a)(2)(ii) and (iii).

[56] 47 C.F.R. § 20.13(a)(2)(v).

[57] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

21. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

22. While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.[58] Under the caselaw potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors,[59] and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in the Hawaii market have committed to pay substantial sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment.

**BROADBAND PCS AUCTION RESULTS**

| Hawaii | | | | | |
|---|---|---|---|---|---|
| MTA # | Freq. Blk. | State | Market | Winning Bidder | Winning Bid |
| M047 | A | Hawaii | Honolulu | Western PCS Corporation | $22,361,030 |
| M047 | B | Hawaii | Honolulu | PCS PRIMECO, L.P. | $21,675,432 |

[58] *See, e.g.*, McCaw Personal Communications, Inc. v. Pacific Telesis Group, 645 F. Supp. 1166, 1174 (N.D. Cal. 1986) ("the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high"), *citing* United States v. Waste Management, Inc., 743 F.2d 976, 982-83 (2d Cir. 1984). *See also* American Bar Association, I Antitrust Law Developments (Third) 307-11 (1992) and cases cited therein.

[59] *See* FTC v. Owens-Illinois, Inc., 681 F. Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning "the extensive present and future intermaterial competition in the glass and other packaging industries," "[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic"); Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (Apr. 2, 1992)(*Merger Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: "In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact") (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

23. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It *is* happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge that reasonably soon they will face new competition from PCS licensees.[60] The advent of PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.[61] Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantial and pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

24. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

25. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the statutory goal of promoting investment in the cellular infrastructure. In that event, the rates underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

26. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic factors.[62] For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.[63] Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.[64] Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

27. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to be persuasive. Those demonstrations that are tied most

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[60] *See, e.g.*, Comm. Daily, Apr. 24, 1995, "*Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS* " (report on independent researcher's projection of cellular service rate cuts "up to 40%" over next two years); Comm. Daily, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is $24.99, with additional min. at 29 cents in home county, 99 centsh);elsewhere"); M. Mills, *Wireless: The Next Generation*, Wash. Post, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal -- Bell Atlantic, NYNEX Plan to Merge Their Mobile and Cellular Divisions as PCS Players Continue Consolidation*, InformationWeek, Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

[61] *See, e.g.*, Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 ("Description of Transaction and Public Interest Statement") at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending; Craig O. McCaw*, 9 FCC Rcd at 5862-63.

[62] *See, e.g.*, J. Tirole, The Theory of Industrial Organization 209-70 (1988).

[63] *Id.* at 239-70.

[64] In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.

closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

## IV. CONFIDENTIALITY

28. Hawaii states in its petition that it cannot provide data on the customers served by CMRS carriers subject to regulation, due to the reluctance of CMRS utilities to provide such data absent a guarantee that they will be protected from disclosure.[65] Other states, however, have submitted sensitive commercial data through procedures provided in this Commission's Rules, and such data have been considered on a confidential basis.[66] Any uncertainty on Hawaii's part regarding the treatment of confidential data in this proceeding was dispelled in the *First Confidentiality Order,* which explicitly invited Hawaii to submit supplemental data with a request for confidential treatment, in accordance with Sections 0.457, 0.459, and 0.461 of our Rules. Hawaii has not submitted such data. Thus, any decision not to use confidential data to support Hawaii's Petition is that State's alone.

29. Mobile Telecommunications Technologies Corp. (MTel) on October 19, 1994, filed supplemental reply comments with a motion for their acceptance, asserting that the replies filed timely on October 4, 1994, raised for the first time new arguments that could adversely affect Mtel. Although our rules generally proscribe the filing of supplemental pleadings in proceedings under Section 332(c)(3),[67] MTel presents good cause for waiving our rule in this instance. Moreover, nothing on this record suggests that any party is harmed by accepting MTel's filing, and doing so will expand the record of relevant record materials and thereby tend to improve it. For these reasons, we grant MTel's motion and consider its supplemental reply.

## V. HAWAII PETITION

### A. *Summary of PUC Request*

30. Hawaii regulates five cellular companies and three radio common carriers in the state under Chapter 269 of the Hawaii Revised Statutes, which confers "broad regulatory oversight and investigative authority over all public utility companies."[68] The subject cellular companies are GTE Mobilnet of Hawaii Incorporated (GTE Mobilnet), the only wireline cellular company in the state; USCOC of Hawaii 3, Inc., d/b/a United States Cellular (USCOC); Maui Cellular Telephone Company, Inc. (MCTC); Honolulu Cellular Telephone Company (HCTC); and Cybertel Corporation, d/b/a Cybertel Cellular (Cybertel).[69] The three radio common carriers are Dr. Mark Goldman, d/b/a Island Radio-Phone (Goldman); Ram Paging Hawaii (Ram Paging); and General Telcourier, Inc., d/b/a Pager One (General Telcourier).[70]

31. Hawaii asserts its primary objectives in carrying out regulatory functions are to assure adequate and efficient services and reasonable rates, and to provide a fair return to regulated CMRS utilities. Hawaii states that it seeks to continue its regulation of CMRS utilities' rates and tariffs because it is uncertain whether the initial market driven rates that Petitioner approved for the CMRS utilities when they were certificated are currently just and reasonable.[71] Hawaii says that financial reports filed in the past three years indicate CMRS utilities are "generally beginning to experience either an increase in profits and a recovery of their prior accumulated losses or potential profits for the future. From the outset, the CMRS utilities used market driven rates rather than cost and/or the return on invested capital to structure their rates and tariffs."[72] Based on data submitted by Hawaii, the average after-tax rate of return for cellular carriers was approximately 14 and 19 percent during 1992 and 1993, respectively.[73]

32. Hawaii asserts that financial data show CMRS utilities generally experienced heavy losses during the early years, and profitability after three or more years. The data also show that as the customer base increased, revenues seem to have increased proportionately more than the incremental increase in the associated operating costs and the investment in plant and equipment. Hawaii states the increase in rate of return on the invested plant and equipment has substantially increased over the years, indicating the return will become greater as more customers subscribe.[74] Hawaii asserts that it "intends to test" the market driven rates against the cost of service and rate of return to determine whether the current rates and tariffs are excessive:[75]

> In order to conduct this review and monitor the operating costs, the rate of return on rate base, and the overall financial condition of each of the CMRS utilities, Petitioner must continue to regulate the utilities' rates and tariffs. Additionally, by regulating the rates, Petitioner will also be able to effectively monitor rate design and structure, as well as the availability and quality of service, since each of the CMRS utilities will be required to appear before Petitioner for all rate case filings.

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[65] Hawaii Petition at 6.

[66] *See* Petitions of the Public Utilities Commission, State of Hawaii; the State of California and the Public Utilities Commission of the State of California; the Connecticut Department of Public Utility Control; and the New York State Public Service Commission, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-111, order issued by Wireless Telecommunications Bureau on Jan. 25, 1995, (*First Confidentiality Order);* Petitions of the Public Utilities Commission, State of Hawaii; the State of California and the Public Utilities Commission of the State of California; the Connecticut Department of Public Utility Control; and the New York State Public Service Commission, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-208, order issued by Wireless Telecommunications Bureau on Feb. 9, 1995 (*Second Confidentiality Order).*

[67] *See* 47 C.F.R. §§ 20.13(a)(5), 20.13(b).

[68] Hawaii Petition at 2 n.1.

[69] Evidence submitted by the Hawaii PUC concerning the financial performance of cellular companies operating in that state is presented in Attachment 1 to its Petition.

[70] Evidence submitted by the Hawaii PUC concerning the financial performance of radio common carriers operating in that state is presented in Attachment 2 to its Petition.

[71] Hawaii Petition at 3-4.

[72] *Id.*

[73] *See* Appendix B.

[74] Hawaii Petition at 4.

[75] *Id.*at 4-5.

33. Hawaii also states it should continue to regulate CMRS rates and tariffs to ensure true competition "once other companies are licensed by the FCC and certificated by Petitioner" and contends that "such regulatory oversight is necessary whether the tariffs of the CMRS utilities are based on market driven rates or cost and return on invested capital."[76] Hawaii asserts it should at least continue to regulate CMRS rates and tariffs until the conclusion of its communications infrastructure docket (Docket No. 7702), instituted in May 1993, which it anticipates in mid-1995.[77]

34. Hawaii describes trends in the operators' customer base in Attachments 1 and 2 and Exhibits A-1 through A-8 of its Petition. Rate information is provided in Attachment 3, but Hawaii asserts that it did not include trends because carriers have not sought a rate increase. The regulatory regime to be applied if the Petition is granted is described in Attachment 4 and summarized below.

**B.** ***Rate Regulation for Which Continued Authority Is Sought***

35. Hawaii's proposed general order setting standards for CMRS in the state requires that a tariff be on file and available for public inspection during business hours of each CMRS business office.[78] The tariff is required to include exchange areas, base rate areas, and the "conditions and circumstances" under which service will be furnished, and defining the classes and grades of service available to customers. Maps showing the CMRS utility's service area and facilities are required to be accessible at CMRS business offices as well.[79]

36. Hawaii also would require each CMRS utility to file an annual projection of capital improvements for the ensuing five years, "in considerable detail" for the first year. In addition, Hawaii would require that capital expenditures for single projects exceeding the lesser of $500,000 or 10 percent of the utility's plant in service be submitted for review at least 60 days prior to construction or commitment of funds.[80] The contemplated review process includes a hearing before a HPUC determination that any portion of the proposal should be disallowed from the rate base.

37. The proposed general order also addresses customer billing disputes and related matters,[81] the establishment of customer credit and deposits, and complaint procedures,[82] engineering standards,[83] inspections and tests,[84] service quality standards,[85] and safety requirements.[86]

38. The existing tariffs submitted by Hawaii as Attachment 3 to its Petition indicate tariffing practice of several years standing that generally comports with the proposed general order. Thus, for example, the HCTC tariff includes three cellular service plans apparently established in March 1986, and definitions of peak and off-peak rate periods that have not been altered since January 1990.[87] The rates and application of several options under the basic cellular plan and two options for the bulk service plan each date from August 1990.[88] The general terms of the HCTC reseller service plan date from March, 1986,[89] while rates under optional plans date from 1989 or 1990.[90]

## VI. CASE ON THE MERITS

**A.** ***Pleadings of the Parties***

39. Several commenters oppose the petition. BellSouth, GTE, and McCaw offer the specific perspective of cellular operators, while trade groups, including CTIA and PCIA, assert more general contentions about the state of cellular competition and standards for review of petitions. In addition, AMSC urges continued preemption of state authority over space and ground segments of mobile satellite services (MSS), and AMTA opposes state rate authority over reclassified private land mobile services.

40. Support for partial grant of the petition, limiting state rate authority to cellular providers, comes from resellers, *i.e.*, the NCRA. While Nextel, a competitor of incumbent cellular operators in its provision of Specialized Mobile Radio (SMR) and wide area SMR service, only asserts that such a selective grant is warranted in California, other parties contend the prospect of disparate rate regulation in Hawaii is raised by Nextel's suggestion. Similarly, E. F. Johnson asserts that if formerly private carriers are subject to rate regulation, local SMR service should be excepted, and only wide area SMR should be subject to continued rate authority as applied to cellular service. PCIA, Paging Network, and Mtel argue Hawaii has provided no basis for asserting rate authority over paging and other non-cellular CMRS, and these parties, joined by GTE, McCaw, and RCA, also address whether rate authority limited to cellular service would impair regulatory parity.

41. Opponents of any continued rate authority state that Hawaii does not even allege that market conditions fail to protect subscribers, or that the existing state regulatory regime better protects consumers than the Federal forbearance approach.[91] Indeed, GTE contends Hawaii's existing regulatory practice has substantially delayed new service

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[76] *Id.*

[77] *Id.* at 5-6.

[78] Hawaii defines "tariff" to include "the entire body of rates, charges, definitions, rules and regulations, including those contained in special contracts with customers and in supplemental tariffs, adopted and filed by the CMRS utility and authorized by the Commission." Hawaii Petition Att. 4 at 2 (Sec. 1.3, "Definitions"). The accessibility requirement is at Sec. 2.3.a.

[79] Hawaii Petition Att. 4 at 3-4 (Sec. 2.3.b.).

[80] Hawaii Petition Att. 4 at 4 (Sec.2.3.d.).

[81] Hawaii Petition Att. 4 at 5 (Sec. 4.1).

[82] Hawaii Petition Att. 4 at 5-9 (Sec. 4.2-4.4). The copies of the Attachment provided to the Commission lack page 8 but the internal organization indicates the absent text applies to consumer protection provisions.

[83] Hawaii Petition Att. 4 at 9-10 (Secs. 5.1-5.3).

[84] Hawaii Petition Att. 4 at 10-11 (Secs. 6.1-6.6).

[85] Hawaii Petition Att. 4 at 11-13 (Secs. 7.1-7.4).

[86] Hawaii Petition Att. 4 at 13 (Secs. 8.1-8.2).

[87] *See* HCTC P.U.C. Tariff No. 1A, Original Sheet 5, First Revised Sheet 6.

[88] HCTC Tariff P.U.C. No. 1A, Second Revised Sheet 9-9A, and First Revised Sheet 12.

[89] HCTC Tariff P.U.C. No. 1A, Original Sheet 13.

[90] *See* HCTC Tariff P.U.C. No. 1A, First Revised Sheet 17, 17A; Second Revised Sheet 18, First Revised Sheet 18, Original Sheet 18A.

[91] BellSouth Opposition at 1-3; McCaw Opposition at 2-3.

offerings and alternative rate plans.[92] McCaw and BellSouth assert that state petitions must demonstrate market conditions that are substantially deficient when compared to national duopoly circumstances , and that Hawaii's limited factual submission does not identify the state as distinctively problematic.[93] McCaw also asserts that Hawaii should be required to demonstrate that market conditions cannot be remedied by exercise of retained Federal authority under Sections 201, 202, and 208 of the Communications Act, and that the benefits of Hawaii's proposed regulation will exceed costs.[94]

42. Nextel similarly asserts that, with respect to "non-dominant" CMRS providers such as its SMR and wide area SMR operations, Hawaii has not satisfied the statutory standard. Nextel contends, however, that state regulation of "dominant" CMRS providers, *i.e.*, cellular operators, is justified. McCaw responds that both Congress and the Commission have rejected a regulatory distinction based on "dominance" of cellular service, and notes the Congress considered and rejected a proposal to authorize disparate regulatory requirements on existing and new service providers.[95] CTIA adds that the statutory preemption test is not premised on a dominance standard, but on review of market conditions with an eye toward similar regulatory treatment of similar services.[96] McCaw also notes that Nextel's support of continued regulation of cellular is unsupported by economic or other evidence.[97]

43. As to Hawaii's concern whether existing CMRS rates are reasonable in light of recently improved CMRS carrier earnings, opponents state that Hawaii's return data, even if accepted as valid,[98] do not establish the unreasonableness of rates in an industry facing quite different circumstances than a traditional public utility.[99] Indeed, GTE and BellSouth assert real cellular rates have declined over the last several years, such that Hawaii's rates are some of the lowest in the country.[100] Commenters stress that Hawaii has not otherwise sought to demonstrate or substantiate problematic market conditions,[101] and iterate the Commission's past determination that cellular industry characteristics in general, notwithstanding its duopolistic structure, warrant forbearance from selected elements of Federal regulatory authority.[102]

44. Opponents also assert that Hawaii's initiation of an inquiry into rate base regulation is not a continuation of current regulation, and much of its proposed future regulatory mechanism does not pertain to rates.[103] McCaw states that granting continued rate authority to enable review of market driven rates by reference to costs and returns is to invert Section 332 of the Act, which requires an initial demonstration of unreasonable rates as a basis for grant of rate authority. McCaw notes that Hawaii can file a subsequent petition if findings in its infrastructure docket enable such a demonstration.[104]

45. The NCRA supports the Hawaii petition, asserting that until "effective competition" arrives, continued state rate regulation is necessary to restrain the dominating market power of cellular duopolists. NCRA references reports issued by several Federal agencies describing the competitive deficiencies of cellular market structure, including the Department of Justice review undertaken with respect to generic wireless waivers sought by Bell Operating Companies.[105] For the Commission to reject the several states' petitions, which are the only form of regulatory oversight absent Federal monitoring of cellular, NCRA argues, it must reject its own views as well as those of the Department of Justice.[106] CTIA replies that the Commission's forbearance standard in the *CMRS Second Report and Order* was based on a finding of sufficient competition, and that proponents of state rate authority generally have failed to support their assertions with empirical evidence of market power.[107] McCaw adds that NCRA's documents in most instances predate spectrum auction legislation, and all but one predate the *CMRS Second Report and Order;* none, asserts McCaw, adduce state-specific findings respecting market conditions.[108]

### B. *Discussion*

#### 1. Qualification of Petition

46. Hawaii has not submitted its currently effective tariffing and rate regulations, and the absence of requests for rate increases since CMRS carriers initiated service suggests limited occasion to exercise or develop various aspects of HPUC rate regulatory practice. Examination of tariffs submitted with the Petition, however, as well as comments submitted by carriers operating in the state, indicate that while Hawaii has not yet undertaken detailed rate-based regulation as a routine procedure, its present review of rates requires tariffing and its review of such tariffs apparently may entail significant and protracted delay of those tariffs' effectiveness.[109] Nor do cellular carriers operating in Hawaii dispute the presence of existing rate regulation; although BellSouth characterizes it as minimal.[110] GTE characterizes the state's review of new

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92 GTE Opposition at 4-8.

93 BellSouth Opposition at 11-12; McCaw Opposition at 4-6.

94 *Id.*

95 McCaw Reply at 7-9.

96 CTIA Reply at 1-3.

97 McCaw Reply at 3-6. Nextel's argument in the California context occasioned responses from several parties in this proceeding concerned about regulatory parity. *See, e.g.,* GTE Opposition at 17-19; McCaw Opposition at 3-4; Mtel Opposition at 6-8; GTE Reply at 2-6; PageMart Reply at 1-4; RCA Reply at 1-4. As we deny Hawaii's Petition in its entirety, we need not consider these contentions.

98 BellSouth asserts the accounting method returns used by Hawaii are inferior to economic return data on several grounds, and GTE criticizes HPUC's use of pre-tax return data for both cellular and paging services. *See* BellSouth Opposition at 12-14, Rozek Aff. at 6-7; GTE Opposition at 20-21.

99 BellSouth Opposition at 15-16; McCaw Opposition at 6-8.

100 GTE Opposition at 3-4, 21-23; BellSouth Opposition at 21-22.

101 BellSouth Opposition at 11-12; McCaw Opposition at 6-8; GTE Opposition at 13-17; CTIA Opposition at 2.

102 CTIA Opposition at 8-9; McCaw Opposition at 2-3.

103 BellSouth Opposition at 3, 18-19.

104 McCaw Opposition at 8; *see also* PCIA Opposition at 11-12.

105 NCRA Comments at 2-3, *citing* United States v. Western Electric, Memorandum of the United States in Response to Bell Companies' Motion for Generic Wireless Waivers, Civ. Action No. 82-0192 (filed July 25, 1994).

106 NCRA Comments at 4-6.

107 CTIA Reply at 4-5.

108 McCaw Reply at 3-6.

109 *See* GTE experience, described in GTE Opposition at 4-8.

110 *See, e.g.,* BellSouth Opposition at 22 ("BellSouth submits

service offerings as "burdensome and time-consuming," asserting that all rates must be filed with and approved by the HPUC, and that "most rate or service offerings" are delayed 30 days before becoming effective.[111] Even recognizing that each instance of pre-effectiveness review of tariffed service offerings may not turn directly on the reasonableness of proposed rates, we consider such review a recognized element in the common understanding of "rate regulation." Hawaii's *existing* regime is sufficiently portrayed in the record to demonstrate that "regulation concerning the rates for any commercial mobile service" was being exercised by that state on June 1, 1993. Therefore, we conclude that Hawaii's Petition is properly before us.

**2. Showing on the Merits**

47. Section 332(c)(3) provides that a state petition shall be granted if it "demonstrate[s]" that market conditions for the service at issue fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates. On this record we conclude that Hawaii has not made such a demonstration and, accordingly, we deny its Petition.

48. Our decision is based in part on the fact that Hawaii's Petition in principal part does not argue that market conditions fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates. Rather, Hawaii principally requests continued rate authority *in order to determine* market conditions. The statute is not satisfied by a showing of uncertainty about the need for rate regulation, however. Section 332(c)(3) requires a demonstration that market conditions *fail* to protect subscribers, not that they *may be failing* to protect them.

49. Our decision also is based on other factors. First, Hawaii does not address the direct and fundamental changes to the duopoly cellular market structure that are being realized by PCS and other services, such as wide area SMR. Second, Hawaii presents no systematic or authenticated evidence of collusive or otherwise anticompetitive practices concerning the provision of any CMRS. Third, Hawaii does not present evidence showing widespread consumer dissatisfaction with CMRS providers in that state, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fourth, Hawaii fails to advance any persuasive analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers).[112]

50. Another shortcoming of Hawaii's Petition is that it views any evidence of market imperfection as proof of a need for continued rate regulation, while all countervailing evidence is attributed to its regulatory oversight. Even assuming such an argument is reasonable in theory, the HPUC has not established its factual predicate. The HPUC does not appear to have prescribed any particular pricing or rate development formula, and with minor exceptions, all currently effective and previously effective cellular rates in Hawaii appear to have been carrier-initiated. On this record, we are not persuaded by the HPUC's implicit argument that, absent continuation of its rate regulation authority, even for a limited period of time, cellular or other CMRS rates will quickly fall outside the zone of reasonableness.

51. Finally, by default, rate of return information becomes the principal remaining girder upon which Hawaii might rest its case. In general, we are not persuaded that rate of return evidence alone constitutes sufficient ground to support a petition, even assuming, *arguendo*, that Hawaii's pre-tax return data accurately portray carriers' financial performance.[113] In this regard, the relevant observation is not how such returns compare with those earned by traditionally regulated public utilities in mature, stable environments. Rather, any such observation must account for the fact that CMRS is a dynamic and relatively infant industry that is still developing. A key element of the study of markets is the recognition that not all industries and markets are at the same stage of development.[114] Thus, the comparision necessary for determining whether prices are just and reasonable is not with mature industry, but with high growth industries. It has been shown that the rate of growth of output is one of the most important determinates of profitability, that is, all other things being equal, high growth firms (such as the cellular industry) tend to earn high profits.[115] Furthermore, even if profits are high now, the entry of PCS should contain those profits increasingly forcefully. Thus, evidence that cellular industry profits are higher than that we might allow, for example, for local exchange carriers, is not dispositive.

52. Hawaii's specific rate of return evidence does not disuade us from this view. During 1992 and 1993, the weighted average after-tax returns are 14.2 percent and 19.6 percent, respectively. We do not consider this to be high in the context of a high growth industry. These levels likely will be reduced as the presence of PCS carriers grows in Hawaii -- an event we think it reasonable to measure in months, not years. That additional competition should drive prices and rates of return of cellular carriers down even further. Even now, the data Hawaii provided show negative or very low returns for many CMRS carriers. For example, during 1993, GTE Mobilenet, Inc.'s operations on the Islands of Hilo, Maui, Oahu and Kauai show returns of -12.2 percent, 3.39 percent, 8.55 percent, and -4.79 percent,

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that the HPUC's generally hands-off regulation serves as a model demonstrating that market driven policies, not draconian rate of return regulation, better serve the public interest.").

[111] *See* GTE Opposition at 5-8.

[112] An important indicator of market failure, in our view, would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price. Here, in contrast, the record shows a general pattern of substantial investment by licensees. Record data demonstrate that CMRS carriers continue to invest in plant at levels significantly above their depreciation schedules. *See* Appendix C.

[113] Because Hawaii has not adduced significant evidence in this or in other respects, we need not consider the several methodological arguments raised by commenters against the method used to develop HPUC return data. We do not suggest by this that the return data submitted by HPUC are accepted without reservation.

[114] For example, Prescott, Kohli, and Ven Katraman have shown that the determinants of rate of return on investment vary between mature industries and emerging industries. *See* J. Prescott, A. Kohli & N. Ven Katraman, "The Marketshare-Profitability Relationship: An Empirical Assessment of Major Assertions and Contradictions," *Strategic Management Journal*, Spring 1986, 377-94. They found, for example, that high market share is correlated with high rates of return in mature industries, but not for emerging industries.

[115] D. Ravenscraft, "Structure-Profit Relationship at the Line of Business and Industry Level" Review of Economic and Statistics, Feb. 1983, at 22-31.

respectively. Even where profits seem high in a given year, we recognize that short term profits must be earned to recover losses or lean returns in previous years, otherwise investment capital may turn to other more profitable investments. In sum, while we would be concerned if average rates of return were high in the long term, particularly after accounting for the high growth rate, Hawaii has not demonstrated that such conditions exist. For that and the foregoing reasons, we deny Hawaii's petition.

## VII. REGULATION OF OTHER TERMS AND CONDITIONS

53. Prior to OBRA, Section 332 prohibited the states from imposing "rate ... regulation" upon certain wireless telecommunications carriers.[116] This prohibition was construed broadly to preclude almost all state regulatory activity.[117] As revised by OBRA, Section 332(c)(3) now prohibits states from regulating "the rates charged" for CMRS, but it expressly reserves to them the authority to regulate the "other terms and conditions of commercial mobile services." Although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the HPUC is entitled to continue, despite our denial of its Petition.

54. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:[118]

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

55. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the HPUC Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

56. First, although the HPUC may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.[119] In consequence, it is conceivable that matters might arise under state complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit Hawaii to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

57. Second, under the same logic, we also conclude generally that several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the public utility commission, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe Hawaii retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state.[120]

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[116] The statute provided in relevant part that "[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . . ." 47 U.S.C. § 332(c)(3)(prior to revisions enacted by OBRA).

[117] *See, e.g.*, Telocator Network of America v. FCC (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission's interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). *See also, e.g.*, American Teltronix (Station WNHM552), 3 FCC Rcd 5347 (1988)("Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier."), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990)(note omitted) ("state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute .... [A]ccompanying legislative history reveals that Congress recognized the Commission's broad discretion to dictate which land mobile systems are to be regulated as private."). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission's Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 (para. 24 n.19) (1990):

> If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

[118] H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 261.

[119] *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person "complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a) (emphasis added).

[120] We remind Hawaii that the certification process contemplated by its proposed general order is precluded by the provision in amended Section 332 that categorically preempts state and local entry regulation, and the statute makes no provision for continuance or extension of this authority by this

We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of the Hawaii regulatory practice at issue.

### III. ORDERING CLAUSES

58. Accordingly, pursuant to Section 332(c)(3)(B) of the Communications Act, 47 U.S.C. § 332(c)(3)(B), IT IS ORDERED that the Petition for Authority To Extend Rate Regulation of Commercial Mobile Radio Services, filed by the Public Utilities Commission, State of Hawaii, IS DENIED for the reasons set forth above.

59 . IT IS FURTHER ORDERED that the motion for acceptance of supplemental reply comments, filed October 19, 1994 by Mobile Telecommunications Technologies Corp., IS GRANTED.

60. IT IS FURTHER ORDERED, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order SHALL BE FILED within thirty days of the day after the day on which public notice of this action is given.[121]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

### Appendix A

PR Docket No. 94-103 (Hawaii)

*Parties Filing Comments or Oppositions to Hawaii Petition*

AMSC Subsidiary Corporation in Response to Various State Petitions to Regulate Rates of CMRS Providers

American Mobile Telecommunications Association, Inc.

BellSouth Corp.

Cellular Telecommunications Industry Assoc.

E.F. Johnson Co.

GTE Service Corp. on behalf of GTE Mobilnet of Hawaii Inc. and GTE Hawaiian Telephone Company Inc.

McCaw Cellular Communications, Inc. Mobile Telecommunications Technologies Corp.

National Cellular Resellers Assoc.

Paging Network, Inc. on Petitions by State Authorities to Continue Regulation of CMRS Rates

Nextel Communications, Inc.

Personal Communications Industry Assoc.

*Parties Filing Replies*

Cellular Telecommunications Industry Association

GTE Service Corporation

McCaw Cellular Communications, Inc.

PageMart, Inc.

Rural Cellular Association

Supplemental Reply Comments of Mobile Telecommunication Technologies Corp.

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Commission. As of the effective date of the amendment, therefore, Hawaii's certification jurisdiction over commercial mobile radio service was terminated. *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 261.

[121] Although we assigned the HPUC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

# APPENDIX B

## After-Tax Rates of Return in Hawaii

| Company-Market | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| GTE Mobilnet, Inc. - Hilo | NA | NA | 5.10% | -10.06% | -12.20% |
| GTE Mobilnet, Inc. - Maui | NA | NA | 22.82% | 1.01% | 3.93% |
| GTE Mobilnet, Inc. - Oahu | NA | NA | -18.40% | -2.25% | 8.55% |
| GTE Mobilnet, Inc. - Kauai | NA | NA | 6.87% | -8.78% | -4.79% |
| USCOC of Hawaii 3, Inc - Island of Hawaii | NA | NA | -22.76% | -4.20% | 2.59% |
| Maui Cellular Telephone Co. - Maui | NA | NA | NA | NA | -10.11% |
| Honolulu Cellular Company - Oahu | 8.95% | 12.53% | 24.14% | 43.12% | 43.73% |
| Cybertel Cellular - Kauai | NA | NA | -28.66% | 5.45% | 36.97% |
| Average After-Tax (Weighted By Average Net Plant and Equipment) | | | | 14.15% | 19.64% |

Sources: PR Docket No. 94-103, Petition of Public Utilities Commission, State of Hawaii, For Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, filed Aug. 8, 1994, EXHIBIT A-1. Hawaii provided pre-tex rates of return. The effective tax-rate used for this table is 38.22% (34% Federal, 6.4% State).

## APPENDIX C

### Increase Net Plant in Hawaii

| Company-Market | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| GTE Mobilnet, Inc. - Hilo | NA | NA | 1345 | 2468 | 2714 |
| GTE Mobilnet, Inc. - Maui | NA | NA | 1497 | 3165 | 3113 |
| GTE Mobilnet, Inc. - Oahu | NA | NA | 10,796 | 14,148 | 18,790 |
| GTE Mobilnet, Inc. - Kauai | NA | NA | 845 | 2821 | 3753 |
| USCOC of Hawaii 3, Inc - Island of Hawaii | NA | NA | 2173 | 2283 | 3315 |
| Maui Cellular Telephone Co. - Maui | NA | NA | NA | NA | 214 |
| Honolulu Cellular Company - Oahu | 11,599 | 15,155 | 20,067 | 18,505 | 18,719 |
| Cybertel Cellular - Kauai | NA | NA | 2449 | 2808 | 2659 |
| Total Plant and Equipment | NA | NA | 39,172 | 46,198 | 53,277 |
| Annual Growth | | | | 18% | 15% |

Source: PR Docket No. 94-103, Petition of Public Utilities Commission, State of Hawaii, For Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, filed Aug. 8, 1994, EXHIBITS A-1, A-2, A-3, A-4 and A-5.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 87-266**

In the Matter of

TELEPHONE COMPANY-
CABLE TELEVISION
Cross-Ownership Rule,
Sections 63.54-63.58

**THIRD REPORT AND ORDER**

**Adopted: May 16, 1995; Released: May 16, 1995**

By the Commission:

## I. INTRODUCTION

1. In this *Third Report and Order*, we adopt the tentative conclusion set forth in the *Fourth Further Notice of Proposed Rulemaking* ("*Fourth FNPRM*")[1] in the above captioned docket regarding our legal authority to waive Section 613(b) of the Communications Act, 47 U.S.C. § 533(b). Section 613(b) generally prohibits telephone companies from providing "video programming directly to subscribers in the[ir] telephone service area." However, the statute expressly authorizes us to waive the restriction "where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by" a telephone company "or upon other showing of good cause." For the reasons set forth below, we conclude that Section 613(b)(4) authorizes us to grant waivers to allow telephone companies to provide video programming directly to subscribers in their telephone service areas under certain conditions. In particular, in response to decisions of the Fourth and Ninth Circuits, we conclude that under Section 613(b)(4) we have the legal authority to grant waivers allowing telephone companies to provide video programming in their telephone service areas on video dialtone networks. We adopt that construction of the waiver provision because it is fully consistent with the language of the statute and Section 613(b)'s underlying policy, and because waiving the restriction in that manner obviates the constitutional infirmities identified by the courts of appeals. We do not decide any other issues raised in the *Fourth FNPRM* in this Order. In particular, we do not decide whether telephone companies may provide video programming over video dialtone networks rather than as traditional cable operators. In addition, if a telephone company is permitted to provide video programming on a video dialtone system, we are not here deciding whether that telephone company should be regulated under Title II or Title VI of the Communications Act. Nor do we decide the conditions under which telephone companies may be granted waivers to provide traditional cable service in their telephone service areas. Those issues and others will be decided in a subsequent order.

## II. BACKGROUND AND SUMMARY

2. Section 613(b), which is sometimes referred to as the "cable-telco cross-ownership rule," prohibits a telephone company from operating a cable system where it has a monopoly on local telephone service. More specifically, although Section 613(b) does *not* bar a telephone company from acting as a conduit to carry video programming selected and provided by an unaffiliated party, it *does* generally bar a telephone company from selecting (or "exerting editorial control over") and providing the video programming carried over its wires in its local service area. Two courts of appeals, the Fourth and Ninth Circuits, have recently held Section 613(b) unconstitutional.[2] At the heart of both decisions is the conclusion that the statute unnecessarily limits speech by telephone companies because it prohibits them from choosing the video programming to be provided in their local exchange telephone service areas *altogether*. In so holding, both courts referred to the Commission's 1992 recommendation to Congress in our video dialtone docket, a proposal that the Ninth Circuit described in *US West* as a "more speech-friendly plan" than the absolute ban contained in the statute.[3] Under the Commission's legislative recommendations, as described by the Fourth Circuit in *C&P*, "telephone companies' editorial control over video programming [would be limited] to a fixed percentage of the channels available; the telephone companies would be required to lease the balance of the channels on a common carrier basis to various video programmers."[4] In short, the courts of appeals have held that a complete ban on editorial control over video programming in a telephone company's service area "'burden[s] substantially more speech than is necessary,'" especially since there appeared to be an "obvious less-burdensome alternative[]'" – allowing the telephone company to provide some video programming in their telephone service areas on a video dialtone system.[5]

3. We now conclude, as we previously proposed in the *Fourth FNPRM*, that we have the authority to grant waivers to telephone companies pursuant to Section 613(b)(4) allowing them to provide video programming directly to subscribers in their telephone service areas over video dialtone networks. Section 613(b)(4) provides that upon a

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[1] *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63-54-63.58*, FCC 95-20, Fourth Further Notice of Proposed Rulemaking (released Jan. 20, 1995) (*"Fourth FNPRM"*) .

[2] *See US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1995) (*US West); Chesapeake and Potomac Tel. Co. v. United States* , 42 F.3d 181 (4th Cir. 1994) (*C&P*).

[3] *US West*, 48 F.2d at 1105, citing *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5850 (1992) (*Video Dialtone Order*).

[4] *C&P*, 42 F.3d at 202, citing *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5850-5851 (1992).

[5] *Id.*, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), and *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 930 (E.D. Va. 1993).

showing of "good cause" the Commission may waive the cable-telco cross-ownership restriction where a waiver is "justified by the particular circumstances . . ., taking into account the policy" underlying the cross-ownership restriction.[6] Our current video dialtone rules, which are based on fundamental principles of common carriage, are designed to enhance competition in the multichannel video distribution market by providing multiple video programmers access to end user subscribers over the telephone company's network.[7] Consistent with this common carrier model, our current video dialtone rules generally preclude any one programmer from serving as an "anchor programmer" and hence monopolizing the channels on the system. Waivers authorizing telephone companies to provide video programming in those circumstances will advance the policy underlying the cross-ownership restriction, which was enacted to promote competition in the multi-channel video programming market.[8]

4. Construing the waiver provision to authorize telephone companies to provide video programming over video dialtone networks avoids the constitutional infirmity identified by the Fourth and Ninth Circuits by making available the "obvious less-burdensome alternative" referenced by those courts.[9] Moreover, it is our duty to so construe the statute. The Supreme Court has recently reiterated in *United States v. X-Citement Video, Inc.* that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions."[10] Thus, as the agency charged with implementing the Communications Act, we should construe it in a manner that renders it constitutional, and the decisions invalidating Section 613(b)(4) plainly show that, absent a waiver allowing telephone companies to offer video programming over video dialtone networks, there is a serious question as to whether Section 613(b) unnecessarily burdens substantially more speech than is necessary to promote competition in the multi-channel video programming market.[11]

5. In light of the ongoing litigation concerning the constitutionality of Section 613(b), we have decided to adopt the construction of Section 613(b)(4) that we proposed in the *Fourth FNPRM* before answering the other questions presented in this rulemaking. The Supreme Court will soon have to decide whether to review the Fourth Circuit's decision in the *C&P* case. A rehearing petition is pending in the Ninth Circuit in the *US West* case.[12] In addition, a number of district courts have issued injunctions barring enforcement of Section 613(b), and some of those decisions have been appealed.[13] By implementing a "more speech-friendly plan" pursuant to the waiver authority granted in Section 613(b)(4), we make it unnecessary for those courts to decide whether a complete prohibition on video programming by telephone companies in their exchange areas is constitutional.

## III. DISCUSSION

6. On account of the cable-telco cross-ownership ban, in our initial video dialtone orders we envisioned telephone companies providing a common carrier platform over which others would transmit programming.[14] In the ongoing trials of video dialtone service, some programmers are "packagers" -- that is, they provide packages of multiple channels, much like a cable operator -- while other programmers provide individual channels. In light of the court decisions granting injunctions to telephone companies barring the enforcement of the cable-telco cross-ownership rule,[15] we have authorized two telephone companies conducting video dialtone trials to select and provide some of

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[6] We have waived the cable-telco cross-ownership rules on a number of occasions. Typically, these waivers have been sought on a temporary basis for experimental purposes, or to allow telephone companies to come into compliance with our cross-ownership rules by, for example, divesting cable holdings acquired after mergers. *See, e.g., Time Warner Entertainment Co., L.P. and U S West Communications, Inc.*, 8 FCC Rcd 7106 (1993).

[7] *See Video Dialtone Order*, 7 FCC Rcd 5781 (1992), *aff'd in part and modified in part on recon.*, 10 FCC Rcd 5781 (1994) *Telephone Company-Cable Cross-Ownership Rules, Section 63.54-63.58, Memorandum Opinion and Order and Reconsideration and Third Further Notice of Proposed Rulemaking (Video Dialtone Reconsideration Order), petition for review pending sub nom. Mankato Citizens Tel. Co. v. FCC*, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

[8] *See NCTA v. FCC*, 914 F.2d 285, 287 (D.C. Cir. 1990) ("the policy [of Section 613(b)] is to promote competition").

[9] *See C&P*, 42 F.3d at 202; *US West*, 48 F.3d at 1104.

[10] *United States v. X-Citement Video*, 115 S. Ct. 464, 467 (1994).

[11] While the courts have identified video dialtone as a possible means by which telephone companies could provide programming in their service areas to remedy the constitutional infirmities of Section 613(b), and while we agree with the suggestion of these courts that waiving Section 613(b) as discussed above will cure these constitutional infirmities, we will address the terms and conditions under which telephone companies should be permitted to provide video programming directly to subscribers in their local service areas in a subsequent order addressing the other issues raised in the *Fourth FNPRM*.

[12] In February, the government suggested that the Ninth Circuit hold the rehearing petition in abeyance while the Commission considers the issue we decide today, and the Ninth Circuit has not yet acted on the rehearing petition. *See* Appellants' Petition for Rehearing and Suggestion for Rehearing *En Banc*, Ninth Cir. No. 94-35775 (filed Feb. 10, 1995).

[13] *See NYNEX Corp. v. United States*, No. 93-1523 (D. Me. December 8, 1994), appeal pending 1st Cir. No. 95-1183; Ameritech Corp. v. United States, 867 F. Supp 721 (N.D. ILL. 1994), appeal pending 7th Cir. No. 95-1223; *BellSouth Corp. v. United States*, Civ. A. No. 3-93-1024 (N.D. Ala. 1994), appeal pending 11th Cir. No. 94-7036; *United States Telephone Association v. United States*, No. 1:94 CV1961 (D.D.C.), appeal pending D.C. Cir. No. 95-5117; *Southwestern Bell Corporation v. United States*, Civil Action No. 3:94 -C-0193-D (N.D. Tex. March 27, 1995); and *Southern New England Telephone Co.*, No. 3:94 -CV-80 (DJS) (D. Conn. April 28, 1995).

[14] *See Video Dialtone Order*, 7 FCC Rcd 5781 (1992) ; *Video Dialtone Reconsideration Order*, 10 FCC Rcd 244 (1994).

[15] *See Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), rehearing denied (Jan 18, 1995); *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), *aff'd, US West, Inc. v. United States*, 48 F.2d 1092 (9th Cir. 1995); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *NYNEX Corp. v. United States*, No. 93-1523 (D. Me. Dec. 8, 1994); *GATE South, Inc. v. United States*, No. 94-1588-A (E.D. Va. January 13, 1995); *Southwestern Bell Corporation v. United States*, Civil Action No. 3:94 -C-0193-D (N.D. Tex. March 27, 1995); *United States Tel. Ass'n v. United States*, No. 1:94 CVO1961 (D.D.C. Feb. 14, 1995); and *Southern New England Telephone Co.*, No. 3:94 -CV-80 (DJS) (D. Conn. April 28, 1995).

the video programming to be carried over their video dialtone systems subject to certain conditions adopted in those orders and any subsequent safeguards that the Commission determines will be necessary.[16] In the *Fourth FNPRM*, we asked for comment on the terms and conditions under which local telephone companies should be permitted to provide video programming directly to subscribers in their local service areas. For instance, we asked whether we should permit them to do so over video dialtone systems.[17] A key issue in the *Fourth FNPRM* is whether such a telephone company is subject to regulation as a common carrier under Title II of the Communications Act, as a cable operator under Title VI of the Act, or under some combination of the statutory provisions governing those sorts of companies.[18] Additional issues involve the sorts of safeguards that are needed to ensure that the telephone company, acting in its capacity as the transporter of video signals, does not discriminate against independent programmers in favor of its affiliated programmer.[19] We do not resolve those issues or others posed by the *Fourth FNPRM* today. However, we construe Section 613(b)(4), the waiver provision, as authorizing us to permit telephone companies to act as programmers on video dialtone systems pursuant to certain conditions. The remaining issues raised in the *Fourth FNPRM* will be resolved in a further order in this proceeding.

7. Two statutory issues are presented in construing Section 613(b)(4): (1) whether "good cause" exists to waive the statutory restriction to permit a telephone company that wants to provide programming in its service area to do so over a video dialtone system, and (2) whether "the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection," when a telephone company requests waiver of Section 613(b) to provide video programming over a video dialtone system.[20] The commenters have paid scant attention to these issues, but we believe that an explanation is warranted as to why there is good cause for granting a waiver under circumstances that will promote competition in the multi-channel video programming market.

8. As the D.C. Circuit recognized in its 1990 *NCTA v. FCC* decision, "the policy [of Section 613(b)] is to promote competition."[21] Congress enacted Section 613 "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets."[22] The House Report on the 1984 Cable Act explained that Congress's intent in enacting Section 613(b) was "to codify current FCC rules concerning the provision of video programming over cable systems by common carriers,"[23] and the Commission adopted those rules in 1970 to "preserv[e], to the extent practicable, a competitive environment for the development and use of broadband cable facilities and service and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities."[24] That is, when the Commission adopted its cable-telco cross-ownership rules in 1970, it sought to prevent the telephone companies from using their monopoly position to preempt the market for cable service by excluding others from entry.[25] The Commission explained that it sought to avoid extending, "without need or justification, the telephone company's monopoly position to broadband cable facilities and the new and different services such facilities are expected to be providing in the future."[26] Since 1970, however, the cable industry has grown from a fledgling service to a more mature industry that now serves a majority of households and "has replaced over-the-air broadcast television as the primary provider of video programming."[27] While Congress's interest in promoting diverse information sources and discouraging anti-competitive abuses remains highly relevant in today's video marketplace, its concern with ensuring that the cable industry not be extinguished before it is established is no longer relevant. "Good cause" is a phrase that is commonly associated with changed circumstances.[28] The relevant circumstances have changed greatly since the Commission adopted its cross-ownership rules in 1970 and Congress "modeled [Section 613(b)] after the FCC['s] rules"[29] in 1984.

9. We also conclude that significant advances in technology have changed the circumstances relevant to determining whether telephone companies should be permitted to provide video programming directly to subscribers in their service areas.[30] When Congress enacted the cable-telco

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[16] *See Bell Atlantic Telephone Companies, Order and Authorization*, FCC 95-15, File No. W-P-C 6834 (released Jan.20, 1995) (*"Bell Atlantic Market Trial and Authorization"*) ; *BellSouth Telecommunications Inc., Order and Authorization*, DA 95-181, File No. W-P-C-6977 (Com. Car. Bur. released February 8, 1995) (*"Be ll South Market Trial Order and Authorization"*).

[17] *See Fourth FNPRM* at para. 10.

[18] *Id.* at para. 9.

[19] *Id.* at paras. 20-41.

[20] 47 U.S.C. Section 533(b)(4).

[21] *NCTA v. FCC*, 914 F.2d at 287.

[22] H.R. Rep. No. 934, 98th Cong., 2d Sess. 55 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4692.

[23] H.R. Rep. No. 934 at 56, *reprinted in* 1984 U.S.C.C.A.N. at 4693.

[24] *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems; Final Report and Order*, 21 FCC 2d 307, 325 (1970) (*"Cable-Telco Cross-Ownership Rules Order"*) , *reconsidered in part*, 22 FCC 2d 746 (1970), *aff'd sub mon. General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

[25] The Commission specifically sought to curtail the opportunities telephone companies would otherwise have to take advantage of their monopoly control over the conduits and telephone poles required for the transmission of video programs to cable subscribers. *Cable-Telco Cross Ownership Rules Order*, 21 FCC 2d at 324.

[26] *Id.* at 324.

[27] *Turner Broadcasting System, Inc. v. United States*, 114 S. Ct. 2445, 2454 (1994), citing Section 2(a)(17) of the 1992 Cable Act.

[28] *See, e.g., Illinois v. ICC*, 713 F.2d 305, 310 (7th Cir. 1983); *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981).

[29] *GTE California, Inc. v. FCC*, 39 F.2d 940, 942 (9th Cir. 1994) (*GTE California*).

[30] Technological advances have long been an accepted basis upon which good cause has been found to justify waiving the cable-telco cross-ownership restriction. In its 1978 *Clarification Order* , the Commission clarified the criteria we would use in granting good cause waivers; the Commission stated that, in particular, we would consider recent technological developments as a justification for a good cause waiver. This standard was cited with approval by the court in *NCTA v. FCC* (1990). *Revision of the Processing Policies for Waivers of the Telephone*

cross-ownership restriction, telephone companies did not have the technology available to them to deliver video signals over the networks they used to provide common carrier telephone service, much less the capability and capacity to provide access to a multitude of video programmers. However, as the D.C. Circuit has recently recognized, since the mid-1980s "technology was advancing rapidly and the once clear line between the provision of video and the provision of voice service was blurring."[31] That is, fiber-optic systems, digitization, and other technological advances have made it possible to transmit video signals over integrated facilities rather than over separate networks and have greatly expanded the capacity of these facilities.[32] These developments have made it possible for a multitude of programmers to reach end user customers and have mitigated to a fair degree the competitive concerns that led the Commission and Congress to adopt the cross-ownership ban. These technological developments also support the conclusion that "good cause" exists to authorize telephone companies to provide video programming within their service areas where that will promote competition in the multichannel video programming market.

10. We also conclude that the rules we will promulgate in the immediate future to authorize telephone companies to provide video programming in their service areas will constitute "particular circumstances . . ., taking into account the policy" of Section 613(b). While we have not yet adopted definitive rules governing the conditions under which telephone companies may be permitted to act as video programmers over their video dialtone systems, the outline of two of those requirements is clear. First, video dialtone necessarily includes a common carriage element, and we have previously concluded that a telephone company may not allocate all or substantially all of its capacity to a single "anchor programmer."[33] Accordingly, a telephone company providing video dialtone service is not allowed to occupy all of the channels provided by the system, but has a common carrier obligation to make capacity available to others.[34] The common carrier aspect of video dialtone service promotes both competitive and free speech interests by making room for more than one speaker. Second, our current video dialtone rules contain provisions intended to ensure that telephone companies providing video programming directly to subscribers do not discriminate in favor of their affiliated programmers and do not subsidize video programming operations with rates collected from their provision of monopoly telephone services.[35] These restrictions are intended to promote the underlying purpose of Section 613(b) by fostering fair competition in the multi-channel video programming market.[36]

11. Construing the waiver provision to authorize telephone companies to provide video programming pursuant to our video dialtone rules obviates the constitutional difficulties associated with Section 613(b). Specifically, the Fourth Circuit and Ninth Circuit have held that the cable-telco cross-ownership restriction "burden[s] substantially more speech than is necessary" to promote the government's interest in promoting a competitive multi-channel video programming market.[37] Waiving Section 613(b) to allow telephone companies to offer video programming in their service areas over video dialtone platforms, however, constitutes implementation of the "obvious less burdensome alternative" to the ban identified by the Fourth Circuit.[38] Or, to quote the Ninth Circuit, it implements the "more speech-friendly plan" that allows telephone companies "to compete in the video programming market" while "requiring that a portion of their transport volume be set aside for sale to unaffiliated third parties on a common carrier basis."[39] As a result of our construction of the waiver provision, telephone companies' free speech interests are not unduly burdened. Telephone companies have always been permitted to provide video programming directly to subscribers in all areas of the country outside of their service areas. In addition, they may produce video programming and provide it to unaffiliated broadcasters, cable operators, or other mass media outlets both within and outside of their service areas.[40] Pursuant to the reading of the waiver provision we adopt today, telephone companies also may seek a waiver of the statutory restriction in order to provide programming directly to subscribers over video dialtone facilities where they have a monopoly on local exchange telephone service. Thus, under our reading of the statute, telephone companies have abundant opportunities to speak.

12. The fact that waiver of the cable-telco cross-ownership restriction obviates the constitutional difficulties identified by the courts of appeals supports our decision to construe our waiver authority to permit telephone companies to provide video programming over video dialtone systems. As the Supreme Court recently reiterated in *X-*

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*Company-Cable Television "Cross Ownership Rules "*, 69 FCC 2d 1097, 1110-111 (1978) (*"Clarification Order"*); *NCTA v. FCC* (1990), 914 F.2d at 289.

[31] *NCTA v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994).

[32] *See id.*

[33] *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 260.

[34] In authorizing Bell Atlantic and BellSouth to provide programming to subscribers a part of their video dialtone trials, we required them to make 50% of their system's capacity available to unaffiliated programmers. *See Bell Atlantic Market Trial and Authorization* at paras. 31, 65(d); *Bell South Market Trial an d Authorization* at paras. 17, 52(a).

[35] The Commission has developed a number of safeguards that are designed to prevent cross-subsidization and discrimination when telephone companies provide "enhanced services." The safeguards against cross-subsidization include accounting and cost allocation rules that separate nonregulated service costs from the costs associated with providing basic regulated telephone service. The non-discrimination safeguards include a variety of rules designed to ensure that unaffiliated enhanced service providers have access to the network on the same basis as affilated enhanced service providers and are not otherwise unfairly disadvantaged. In the ongoing rulemaking proceeding in this docket, we will decide what safeguards are needed when telephone companies provide video programming over video dialtone systems.

[36] It is possible that we will decide in the ongoing rulemaking proceeding that telephone companies ought to be permitted to provide traditional cable service, rather than participate as programmers on video dialtone systems, under "particular circumstances" that will promote competition in the multichannel video programming market.

[37] *See C&P*, 42 F.3d at 202.

[38] We recognize that the Fourth Circuit reserved judgment on the constitutionality of our recommended model. *C&P*, 42 F.3d at 202 n.34. However, if that recommended approach does not render the statute constitutional then, contrary to the court's holding, it is not an "'obvious less-burdensome alternative,'" because it is no alternative at all. *Id.* at 202.

[39] *US West*, 48 F.3d at 1105.

[40] *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 280-281.

*Citement Video*, "a statute is to be construed where fairly possible so as to avoid constitutional questions."[41] In other words, when given a choice between a permissible construction that would avoid constitutional problems and one that raises constitutional doubts, "[i]t is incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress."[42] The Court also articulated this principle in *Jean v. Nelson*, when it found that "[p]rior to reaching any constitutional questions federal courts must consider nonconstitutional grounds for decision."[43]

13. While the majority of commenters did not address the waiver issue, there was support among the commenters for our reading of the statute.[44] Several commenters, however, opposed our reading of the waiver provision, including a telephone company, Southwestern Bell, which argues that our proposal constitutes an evisceration of the rule.[45] That is not so. As we have explained, the purpose of the rule is to promote competition. It generally would not promote competition to allow a telephone company to purchase an incumbent monopolist cable operator in the telephone company's service area. But it *does* promote competition to allow a telephone company to provide video dialtone service in its telephone service area in competition-with an existing cable company. Accordingly, it would eviscerate the statute if we were to waive Section 613(b) to allow telephone companies to provide video programming directly to subscribers in their service areas over video dialtone facilities *and*, as a general matter, to purchase cable systems in their telephone service areas that do not face competition. But we are not authorizing such waivers in this order. Instead, we conclude only that Section 613(b)(4) authorizes us to waive the cable-telco cross-ownership rule to permit a telephone company to provide video programming over video dialtone systems in its telephone service area in competition with existing cable operators, a result that *furthers* the purpose of the rule.[46]

14. Both the United States Telephone Association and US West invoke *Secretary of State of Maryland v. Munson*[47] to argue that the statute cannot be saved by its waiver provision.[48] But this case is not at all similar to *Munson*. The *Munson* case involved a 25% limitation on the percentage of funds a charitable organization could keep, on the theory that a charity that used less than 75% of the funds that it raised on charitable purposes was engaged in fraud. The Court invalidated the state statute imposing the limitation upon concluding that "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on the fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud."[49] Moreover, the Court concluded that the statute stifled speech and discriminated against certain viewpoints, explaining that "the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular."[50] The Court went on to hold that the statute was not saved by a provision allowing for waivers of the limitation. The Court stated that "[b]y placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."[51] "Particularly where the percentage limitation is so poorly suited to accomplishing the State's goal," the Court added, "and where there are alternative means to serve the same purpose, there is little justification for straining to salvage the statute by invoking the possibility of official dispensation to engage in protected activity."[52] In this case, in contrast, permitting telephone companies to provide video programming over a video dialtone system plainly advances the goal of making programming from a variety of sources available to the public -- a goal that furthers rather than hinders First Amendment interests. Unlike *Munson*, speech is not stifled and unpopular viewpoints are not disadvantaged. Moreover, no discretion remotely comparable to that in *Munson* would be lodged in any official to grant or deny particular waivers under our approach. Rather, as part of any decision under 47 U.S.C. § 214 authorizing a telephone company to construct facilities, we will routinely grant a waiver of Section 613(b) where the telephone company agrees to abide by the regulations we will establish governing its provision of video programming. Accordingly, there is no "threat of censorship that by its very existence chills free speech."[53]

15. In light of our duty to interpret Section 613(b) in a fashion that renders the statute constitutional, there is no merit at all to the suggestion by some commenters that the Commission's interpretation of Section 613(b)(4) is barred by res judicata, collateral estoppel,[54] or some unnamed principle that allegedly prevents the Commission from construing a statute that a court has held unconstitutional.[55] In *X-Citement Video*, the Supreme Court read the federal child pornography statute in a manner that the Court acknowledged was not its "most natural grammatical reading" in order to avoid a serious constitutional issue after a court of appeals had held the statute unconstitutional.[56] In particular, the Court held that the statute required the government to prove that the defendant in a child pornography case knew that the material on which the prosecution was based contained child pornography even though the statute did not appear to contain such a scienter re-

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41 *X-Citement Video*, 115 S. Ct at 467.
42 *Id.* at 462. 6
43 *Jean v. Nelson*, 472 U.S. 846, 854 (1985), *quoting* Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981).
44 *See* Comments of Southern New England Telephone.
45 *See* Comments of Southwestern Bell at 43.
46 We do not decide today whether we could grant a waiver authorizing a telephone company to build a traditional cable system in its telephone service area in competition with an existing cable system. Nor do we address the conditions under which a waiver might be warranted to allow a telephone company to purchase an in-region cable system.
47 *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984).
48 USTA Comments at 6; US West Reply Comments at 6.
49 *Munson*, 467 U.S. at 966.5
50 *Id.* at 967.
51 *Id.* at 964 n.12.
52 *Id.*
53 *Id.*
54 *See* Comments of Ameritech at 7.
55 *See, e.g.*, Comments of Bell Atlantic at 29-30; Comments of NYNEX at 29; Comments of Southwestern Bell at 43; Reply Comments of US West at 6.
56 *X-Citement Video*, 115 S. Ct at 467.

quirement.[57] In this case, in contrast, the language of the waiver provision is flexible, speaking of "good cause" and "particular circumstances . . ., taking into account the policy of this subsection." Unlike the Court in *X-Citement Video*, we do not have to strain to construe the waiver provision so that it renders the statute constitutional. Rather, as we have explained, we believe that such an interpretation is fully consistent with both the language of the waiver provision and the policy underlying Section 613(b), and therefore is the best interpretation of Section 613(b)(4). For those reasons, and in light of the fact that such an interpretation also avoids a serious constitutional issue, we now adopt our tentative conclusion that the waiver provision should be interpreted to authorize us to consider and approve requests by telephone companies to provide video programming over video dialtone systems, subject to the rules we have enacted and any further rules we will enact to govern video dialtone systems.

16. Finally, we also conclude that our reading of Section 613(b)(4) is not foreclosed by the D.C. Circuit's 1990 decision in *NCTA v. FCC*. That case did not involve video dialtone service and presented no constitutional issue. It instead involved a waiver of FCC cross-ownership rules authorizing a cable operator to provide cable service over a telephone companies' wires even though the cable operator was affiliated with the telephone company in violation of the rules by virtue of their joint interest in the contractor that was to build the cable system. The court acknowledged that the project "presents a number of advantages that might justify a good cause waiver."[58] However, it held that the Commission had "failed . . . to explain why any of these advantages require [the contractor's] participation as [the telephone companies'] contractor."[59] In this case, in contrast, in light of the decisions holding Section 613(b) unconstitutional, it is necessary to waive Section 613(b) to allow affiliates of telephone companies to provide video programming in order to render the statute constitutional. The Ninth Circuit recognized that a waiver might be warranted in these circumstances in *GTE California, Inc. v. FCC*,[60] a case that (unlike *NCTA v. FCC)* involved a constitutional challenge to Section 613(b). The Ninth Circuit stated in that case, in response to the argument that Section 613(b) is unconstitutional, that "GTECA did not present the constitutional issue to the Commission at a point in this proceeding where it could have tried to obviate the constitutional question by granting discretionary relief, such as a permanent waiver."[61] As that statement recognizes, a waiver is warranted to implement what the Ninth Circuit in *US West* termed our "more speech-friendly plan"[62] and hence avoid a serious constitutional issue.

## IV. CONCLUSION

17. Accordingly, IT IS ORDERED that Section 613(b)(4) of the Communications Act is interpreted to authorize waivers permitting telephone companies to provide video programming directly to subscribers in their telephone service area pursuant to the rules we will adopt in this docket or related rulemaking proceedings.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[57] In fact, the dissenters in that case said that the Court gave the statute a construction "that its language simply will not bear." *Id.* at 473.

[58] *NCTA v. FCC*, 914 F.2d at 289.

[59] *Id.*

[60] *GTE California, Inc. v. FCC*, 39 F.3d 940 (1994).

[61] *Id.* at 946.

[62] *US West*, 48 F.3d at 1105.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

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| Amendment of the Commission's Rules to Establish New Personal Personal Communications Services in the 2 Hz Band | GEN Docket No. 90-314 ET Docket No. 92-100 |
| Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services | RM-7617, RM-7760, RM-7782, RM-7860, RM-7977, RM-7978, RM-7979, RM-7980 |

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 2, 1995; Released: March 3, 1995**

By the Commission:

## I. INTRODUCTION

1. By this action we amend sections 24.101 and 24.204 of our rules governing ownership attribution of licenses in the narrowband and broadband personal communications services (PCS), *see* 47 C.F.R. §§ 24.101, 24.204, to refine and clarify them in light of our decisions to use a "multiplier" when assessing indirect ownership interests. Specifically, we amend our rules to: (1) exempt from attribution certain insulated limited partnership interests held by institutional investors; and (2) increase from five to ten percent the level at which institutional investors' PCS license ownership interests will be attributed. We also clarify that, if an entity holds an indirect interest in a nationwide narrowband PCS licensee that was not attributed prior to the adoption of our narrowband "multiplier" rule, then the interest will remain a non-attributable interest and will not be counted toward the three licenses per market limit. We clarify, however, that this exemption will expire with respect to a particular interest in a license if in the future that exempt interest is transferred or assigned to another entity. These rule amendments will encourage investment in PCS, particularly by institutional investors, and thus promote the rapid deployment of such new services in the public interest. We take this action in response to petitions for reconsideration filed in the above-captioned proceedings by the Morgan Stanley Partnerships (Morgan Stanley).[1] The petitions are unopposed.

## II. BACKGROUND

2. In order to promote competition and safeguard against anti-competitive activities in PCS, our rules impose certain limitations on the ownership of narrowband and broadband PCS licenses. In narrowband PCS we permit common ownership of up to three of the twenty-six 50 kHz channels that are available in each area,[2] while in broadband PCS a "spectrum cap" generally precludes an entity from holding an attributable ownership interest in licenses totalling more than 45 MHz of combined PCS, cellular and specialized mobile radio spectrum in the same geographic area. In addition, no entity may hold attributable interests in more than 40 MHz of broadband PCS spectrum in the same geographic area.[3] Our rules also prohibit cellular carriers from holding an attributable interest in more than one 10 MHz BTA PCS license within their cellular service area.[4] Since it is not uncommon for multiple entities to hold interests in the same license, our rules define those interests that are considered "attributable" for purposes of determining compliance with ownership limitations.[5]

3. To account for situations in which an entity holds an ownership interest in a license indirectly, such as through an intervening corporation, we apply a "multiplier" to determine the effective ownership interest of that entity. This aspect of our attribution rules operates by multiplying intervening ownership interests together to determine the effective ownership level of the entity holding those interests. For example, if Party X owns a 25 percent non-controlling interest in Corporation Y, which in turn holds a 10 percent non-controlling interest in License Z, then Party X is deemed to have a 2.5 percent effective ownership interest in License Z (.25 x .10 =.025). The use of a multiplier allows us to account accurately for a party's actual involvement with the ultimate licensee, as well as the party's ability to exert substantial influence over that license.

## III. PLEADINGS

4. Morgan Stanley argues in its petitions for reconsideration that application of a multiplier to PCS license ownership interests held by institutional investors does not serve the public interest. According to Morgan Stanley, institu-

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[1] Morgan Stanley's petitions for reconsideration were timely filed on September 6 and October 7, 1994, in response to orders in our broadband and narrowband PCS rulemaking proceedings in which we adopted the multiplier aspect of our PCS attribution rules. *See Further Order On Reconsideration,* GEN Docket No. 90-314, 9 FCC Rcd 4441 (1994) (*Broadband PCS Multiplier Order); Second Memorandum Opinion and Order,* GEN Docket No. 90-314, ET Docket No. 92-100, 9 FCC Rcd 4519 (1994) (*Narrowband PCS Multiplier Order*). Morgan Stanley is composed of Morgan Stanley Leverage Equity Fund II, L.P., Morgan Stanley Capital Partners III, L.P., Morgan Stanley Venture Capital Fund, L.P., and Morgan Stanley Venture Capital Fund II, L.P.

[2] *See First Report and Order,* GEN Docket No. 90-314, ET Docket No. 92-100, 8 FCC Rcd 7162, 7167-68 ¶ ¶ 32-34 (1994).

[3] See *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* GEN Docket No. 93-252, FCC 94-212, ¶ ¶ 238-283, released Sept. 23, 1994.

[4] 47 C.F.R. § 24.204.

[5] For purposes of the narrowband PCS license limitation noted in the text above, for example, a licensee is any person or entity with an ownership interest of five or more percent. *See* 47 C.F.R. § 24.101; *Narrowband PCS Multiplier Order,* 9 FCC Rcd at 4521.

tions invest widely in relatively small equity amounts in an attempt to minimize risks associated with asset concentration.[6] A corollary of this investment philosophy, according to Morgan Stanley, is that indirect investment in multiple PCS licensees may result without any intention to obtain control of or influence over a licensee, or any ability to exercise control or influence.[7] Morgan Stanley argues that applying a multiplier under such circumstances does not accurately reflect an institution's involvement with a licensee and will have a deleterious effect on investment in PCS. Rather than run the risk of inadvertently violating the Commission's PCS license ownership limitation rules, institutional investors will simply avoid direct or indirect PCS investments. Thus, Morgan Stanley claims, application of the multiplier rule will have the effect of deterring PCS investment, contrary to the Commission's policy goal of promoting PCS deployment.[8]

5. In order to avoid this result, Morgan Stanley asks that we amend our rules so as not to attribute ownership interests in narrowband and broadband PCS licenses held by limited partners that are not materially involved, directly or indirectly, in the management or operation of the licensee. Morgan Stanley argues that the current rule is overly stringent, is inconsistent with the Commission's experience in the broadcast area, and will deter investment in PCS. Accordingly, Morgan Stanley requests that we import from the broadcast context the rules excepting insulated limited partnerships from attribution. Additionally, Morgan Stanley requests that, in the interest of equity, we "grandfather" partnerships that pre-date the adoption of the multiplier rule even though they would not comply with the partnership insulation criteria it proposes. Morgan Stanley suggests that a general partner be permitted to certify substantial compliance with the "no material involvement standard" of the broadcast attribution rules.[9]

6. Morgan Stanley also requests that we adopt a higher attribution threshold for certain institutional investors, such as pension funds and university endowment funds, that invest indirectly in PCS licensees. Morgan Stanley argues that such institutional investors do not seek to control or influence the management or operations of licensees in which they hold indirect interests and that, moreover, because the investments are indirect there is little opportunity to exert influence over the licensee.

7. Morgan Stanley also requests that we not attribute those interests held by minority or non-controlling shareholders, where a single entity or group of affiliated entities either holds a majority of a licensee's voting interests or effectively controls a company through a voting agreement. Morgan Stanley argues that because the majority or controlling interests are counted at 100% when applying the multiplier, this amendment would eliminate pointless double counting of attributable interests and would better reflect the underlying economic realities of a licensee's ownership. Alternatively, Morgan Stanley requests that we abandon the control rationale and use a simple multiplier to calculate all indirect interests, regardless of control or majority ownership. Finally, Morgan Stanley requests that we clarify that the multiplier rules, along with any additional rules resulting from its reconsideration petitions, will not be applied to investments in nationwide narrowband PCS licensees that were granted such licenses or obtained them at auction prior to August 16, 1994.

8. The National Venture Capital Association (NVCA), Accel Telecom L.P., Accel III L.P. and Accel Investors '89 L.P. (Accel), and The Capital Group Companies, Inc. (Capital Group) support Morgan Stanley's petition.[10] NVCA states the multiplier rule is an unacceptable, additional risk that is a hazard to capital and that subjects genuinely passive investors in PCS licensees to potential violations of Commission rules, including all the attendant sanctions. Gurman, Kurtis, Blask & Freedman (Gurman) also filed in support of Morgan Stanley's petition and additionally requested that we amend Section 24.813(a)(1) and (2) of the Commission's rules to clarify that the reporting requirements of these sections apply only to those indirect interest holders who either (a) hold a majority of the ownership interests or other direct controlling interest in a holder of a direct attributable interest in the applicant or (b) have a direct attributable interest in an entity holding a direct controlling interest in the applicant.[11]

9. Accel states that limited partnerships are commonly used by institutional investors and will be an important vehicle for financing PCS. Accel asserts that limited partners in such structures do not play a material role in the businesses in which the partnerships invest, and therefore should not have their indirect interests in PCS licenses attributed. Accel agrees with Morgan Stanley that certain provisions of the broadcast attribution rules, modified as suggested by Morgan Stanley, should be incorporated into the PCS rules. Accel states that these amendments will soften the impact of the multiplier rule. Without the modification proposed by Morgan Stanley, Accel states that limited partnerships will be deterred from investing in PCS because Accel's limited partners may otherwise face possible violations of the Commission's Rules. Accel argues that this will especially harm PCS entrepreneurs since they will rely on entities such as Accel for the capital to acquire and build out systems.

## IV. DISCUSSION

10. Our PCS proceedings are designed to promote four primary goals: competitive delivery, a diverse array of services, rapid deployment, and wide-area coverage.[12] The ability of PCS entrants to attract capital is essential to achieving these goals. In essence, Morgan Stanley argues that our PCS attribution rules do not promote this ability sufficiently. We note that while promoting PCS investment is an important public interest component of our PCS policies, our attribution rules are designed principally to operate in conjunction with ownership limits to maintain a

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[6] *See* Morgan Stanley Petition, filed Sept. 6, 1994, at 3.
[7] *Id.* at 3-4.
[8] *Id.* at 5-6.
[9] *See* 47 C.F.R. § 73.3555 at note 2(g)(2).
[10] *See* NVCA's Comments, dated October 14, 1994; Accel's Comments, dated October 20, 1994; and Capital Group's Comments, dated November 21, 1994. Capital Group's Comments were 18 days late. In the interest of considering a full record in this matter, we are accepting Capital Group's Comments as a permissible *ex parte* submission.
[11] *See* Gurman Request for Clarification of the Multiplier Rule, dated December 16, 1994.
[12] *See Second Report and Order,* GEN Docket No. 90-314, 8 FCC Rcd 7700 (¶ 5) (1993).

competitive PCS industry.[13] The real question, therefore, is whether treating institutional investors differently under our PCS attribution rules will improve investment incentives without undercutting those rules' primary goal of serving as anticompetitive safeguards. We answer that question affirmatively.

11. This Commission and other regulatory agencies have long recognized a distinction between institutional investors and other investors.[14] This results, in part, because the term "institutional investors" identifies a category of investors that may be defined with some precision.[15] We agree with Morgan Stanley that institutional investors' market activities generally do not raise the type of "control" issues that led us to adopt "bright line" PCS attribution rules.[16] Indeed, we recently amended our rules in this regard to further clarify the definition of institutional investor under our PCS rules and to promote such investors' opportunities to serve as an important source of funding for designated entity PCS companies.[17] Modifying our narrowband and broadband PCS attribution rules in light of Morgan Stanley's request is consistent with our traditional policy and recent action regarding institutional investors. Moreover, we believe that these modifications will serve as an important means for encouraging increased passive investment in PCS. Accordingly, we will amend our PCS rules to: (1) exempt from attribution insulated limited partnership interests held by institutional investors, subject to those investors certifying to the Commission that they are not materially involved directly or indirectly in the management or operation of the carrier activities of the partnership;[18] and (2) increase from five to ten percent the level at which institutional investors' PCS license ownership interests will be attributed.[19] We decline, however, to adopt the single majority shareholder exception requested by Morgan Stanley. We believe that such an exception is unnecessary to address the issues raised by Morgan Stanley with respect to application of the multiplier to indirect institutional investments. Moreover, we do not believe that such an exception is necessary to enable PCS applicants to attract capital from institutional investors given the above-described modifications to our attribution rules.

12. In addition, we conclude that institutional investors who held limited partnership interests prior to the adoption date of this order shall be granted one year from that date to amend their limited partnership agreements to comply with the insulation rules. During this transition period, affected licensees shall certify to the Commission that the limited partners are not materially involved, directly or indirectly, in the management or operation of a PCS licensee.

13. We have decided previously not to apply the multiplier rule to nationwide narrowband PCS licenses granted under our pioneer preference rules prior to August 16, 1994, or to nationwide narrowband PCS licenses auctioned before August 16, 1994 (the date on which we adopted the narrowband PCS multiplier rule).[20] As we noted in that order, we do not believe it would be equitable to apply the multiplier rule to those licensees.[21] In keeping with that rationale, however, we clarify that this exemption will expire with respect to a particular interest in alicense if in the future that exempt interest is transferred or assigned to another entity.

## V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED THAT the petitions for reconsideration filed by Morgan Stanley on September 6 and October 7, 1994, in our broadband and narrowband PCS proceedings, respectively, ARE GRANTED to the extent discussed above.

15. IT IS FURTHER ORDERED that Part 24 of the Commission's Rules IS AMENDED as specified in Appendix A, AND WILL BECOME EFFECTIVE immediately upon publication in the Federal Register.[22]

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[13] *See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services,* 9 FCC Rcd 5947 (1994); *on reconsideration,* FCC 94-265, ¶ ¶ 30-34, released Oct. 19, 1994.

[14] *See, e.g.,* 47 C.F.R. § 73.3555 n.2(i) (relaxed treatment of institutional investors under broadcast attribution rule); 17 C.F.R. § 240.13d-1(b)(1)(ii) (reduced reporting requirements on certain institutional investors under regulations implementing the Securities and Exchange Act of 1934).

[15] *See, e.g.,* 47 C.F.R. § 24.720(h) (definition of institutional investor).

[16] *See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services,* GEN Docket 90-314, 9 FCC Rcd 4957, 5003 (¶ ¶ 105-122) (1994).

[17] *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding,* Fifth Memorandum Opinion and Order, PP Docket No. 93-253, FCC 94-285, ¶ 65 & n.162, released November 23, 1994.

[18] The criteria we adopt for purposes of this certification track those already in use in the mass media context. *See* 47 C.F.R. § 73.3555 Note 2(g)(2); *Memorandum Opinion and Order* in MM Docket No. 83-46, FCC 85--252 (released June 24, 1985), as modified on reconsideration in the *Memorandum Opinion and Order* in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). We recently sought comment on the effectiveness of these insulation criteria in that context, as well as on existing differences between broadcast and wireless telecommunications services. *See Review of the Commission's Regulations Governing Attribution of Broadcast Interests,* MM Docket No. 94-150, FCC 94-324, ¶ ¶ 26-36, 55 & n.110.

[19] Consistent with this change, we clarify that for purposes of the reporting requirements of section 24.813 of the Commission's rules institutional investors are not considered attributable investors in an applicant unless they hold an ownership interest of 10 percent or more in the applicant. We will amend section 24.813 (a)(2) to require applicants to report ownership interests held by institutional investors only if such ownership interests are 10 percent or more.

[20] *See Narrowband PCS Multiplier Order,* 9 FCC Rcd at 4522 n.17.

[21] *Id.*

[22] Pursuant 5 U.S.C. § 553(d)(3), we conclude that "good cause" exists to have the rule changes take effect immediately because a delay would not provide applicants with sufficient time to attract investors and finalize their business plans for the upcoming broadband PCS auctions. Immediate implementation of the rule changes set forth herein also provides applicants with the required certainty to proceed with their bidding and business strategies, alleviating concerns about potential violations of our PCS ownership rules as a result of institutional investments.

16. This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Appendix A: Final Rules**

Part 24 of Title 47 of the Code of Federal Regulations is amended to read as follows:

**PART 24 -- PERSONAL COMMUNICATIONS SERVICES**

1. The authority citation in Part 24 continues to read as follows:

**AUTHORITY: 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.**

2. Section 24.101 is revised to read as follows:

**§ 24.101 Multiple ownership restrictions.**

(a) Narrowband PCS licensees shall not have an ownership interest in more than three of the 26 channels listed in Section 24.129 in any geographic area. For purposes of this restriction, a narrowband PCS licensee is: (i) any institutional investor, as defined in Section 24.720(h) of this Part, with an ownership interest of ten or more percent in a narrowband PCS license; and (ii) any other person or entity with an ownership interest of five or more percent in a narrowband PCS license.

(b) In cases where a party applies for a license after August 16, 1994 or has a license transferred to it after that date, and the party has indirect ownership, through an interest in an intervening entity (or entities) that has ownership in the narrowband license, that indirect ownership shall be attributable if the percentages of ownership at each level, multiplied together, equal five or more percent ownership of the narrowband PCS license, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

EXAMPLE: Party X has a non-controlling ownership interest of 25 percent in Company Y, which in turn has a non-controlling ownership interest of 10 percent in Company Z, the narrowband PCS licensee. Party X's effective ownership interest in Company Z is Party X's ownership interest in Company Y (25 percent) times Company Y's ownership interest in Company Z (10 percent). Therefore, Party X's effective ownership interest in Company Z is 2.5 percent, and is not attributable.

(c) Notwithstanding paragraph (b) of this Section, the following interests shall not constitute attributable ownership interests for purposes of paragraph (a) of this Section:

(1) A limited partnership interest held by an institutional investor (as defined Section 24.720(h)) where the limited partner is not materially involved, directly or indirectly, in the management or operation of the PCS holdings of the partnership, and the licensee so certifies. The criteria which would assure adequate insulation for the purposes of this certification require:

(i) Prohibiting limited partners from acting as employees of the limited partnership if responsibilities relate to the carrier activities of the licensee;

(ii) Barring the limited partners from serving as independent contractors;

(iii) Restricting communication among limited partners and the general partner regarding day-to-day activities of the licensee;

(iv) Empowering the general partner to veto admissions of new general partners;

(v) Restricting the circumstances in which the limited partners can remove the general partner;

(vi) Prohibiting the limited partners from providing services to the partnership relating to the PCS holdings of the licensee; and

(vii) Stating that the limited partners may not become involved in the management or operation of the licensee. *See* 47 CFR § 73.3555 Note 2(g)(2); Memorandum of Opinion and Order in MM Docket 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum of Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986).

(2) Institutional investors who held limited partnership interests prior to March 2, 1995 shall be granted one year from that date to amend their limited partnership agreements to comply with the insulation rules and so certify to the Commission. During this transition period, the licensee in which an institutional investor holds an interest shall also certify to the Commission that the institutional investor limited partner(s) are not materially involved, directly or indirectly, in the management or operation of the licensee.

3. In Section 24.204, paragraph (d)(2)(viii) is redesignated as paragraph (d)(2)(viii)A) and new paragraph (d)(2)(viii)(B) is added to read as follows:

§ 24.204 Cellular Eligibility

* * * * *

(d) * * *

(2) * * *

(viii) * * *

(A) * * *

(B) Notwithstanding paragraph (d)(2)(viii)(A) of this section, the following interests shall not constitute attributable ownership interests for purposes of Section 24.229(c):

(1) A limited partnership interest held by an institutional investor (as defined Section 24.720(h) of this part) where the limited partner is not materially involved, directly or indirectly, in the management or operation of the PCS holdings of the partnership,

and the licensee so certifies. The criteria which would assure adequate insulation for the purposes of this certification require:

(*i*) Prohibiting limited partners from acting as employees of the limited partnership if responsibilities relate to the carrier activities of the licensee;

(*ii*) Barring the limited partners from serving as independent contractors;

(*iii*) Restricting communication among limited partners and the general partner regarding day-to-day activities of the licensee;

(*iv*) Empowering the general partner to veto admissions of new general partners;

(*v*) Restricting the circumstances in which the limited partners can remove the general partner;

(*vi*) Prohibiting the limited partners from providing services to the partnership relating to the PCS holdings of the licensee; and

(*vii*) Stating that the limited partners may not become involved in the management or operation of the licensee. *See* 47 C.F.R. § 73.3555 Note 2(g)(2); Memorandum of Opinion and Order in MM Docket 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum of Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986).

(2) Institutional investors who held limited partnership interests prior to March 2, 1995 shall be granted one year from that date to amend their limited partnership agreements to comply with the insulation rules and so certify to the Commission. During this transition period, the licensee in which an institutional investor holds an interest shall also certify to the Commission that the institutional investor limited partner(s) are not materially involved, directly or indirectly, in the management or operation of the licensee.

* * * * *

4. Section 24.229 is amended by revising paragraph (c) to read as follows:

§ 24.229 Frequencies

* * * * *

(c) PCS licensees shall not have an ownership interest in frequency blocks that total more than 40 MHz and serve the same geographic area. For purposes of this section, PCS licensees are:

(1) Any institutional investor, as defined in § 24.720(h), with an ownership interest of 10 or more percent in a broadband PCS license; and

(2) Any other entities having an ownership interest of 5 or more percent or other attributable ownership interest, as defined in § 24.204(d), in a PCS license.

*Example* 1: Company A, which is a rural telephone company with no cellular interests, buys a 7 percent stake in a 30 MHz BTA that constitutes 8 percent of the population in MTA 1, which encompasses BTA 1. It is then offered an opportunity to buy 8 percent of the equity in a 30 MHz license in MTA 1. It cannot accept this offer because it would be over the 5 percent threshold on two overlapping PCS licenses. Its status as a rural telephone company has no impact on the 5 percent threshold for PCS licensees.

*Example* 2: (1) Company A has two investors, Company B and Company C. Company B owns 15 percent of Company A. Company C, a rural telephone company, owns 25 percent of Company A. Company B and Company C do not have any interests in each other.

(2) Company B has 100 percent ownership of cellular license 1 that covers 20 percent of the pops in BTA 1 and 6 percent of the pops in MTA 1. Company C owns 25 percent of cellular license 2 that covers 20 percent of the pops in BTA 2 and 6 percent of the pops in MTA 1. Company A has no separate cellular interests. MTA 1 encompasses both BTA 1 and BTA 2.

(3) Company A cannot purchase 30 MHz of spectrum in BTA 1. Such a purchase would put Company B over the aggregation limit of 40 MHz in BTA 1 because it would have over 5 percent ownership of the PCS license in addition to its cellular license.

(4) Company A can, however, purchase 30 MHz in BTA 2 or MTA 1 because Company C is a rural telephone company, and thus Company C's interest in cellular license 2 falls below the 40 percent threshold and is not counted against the spectrum cap. If Company C were not a rural telephone company, then Company A could not acquire 30 MHz in BTA 2 or MTA 1 because its partners in those licenses would be over the spectrum cap.

(5) Company B can also buy 30 MHz in BTA 2 or MTA 1 as long as Company A does not also buy 30 MHz in BTA 2 or MTA 1 because Company B and Company C have no joint ownership.

(6) Company C can also buy 30 MHz in BTA 1 or 2 or MTA 1 as long as Company A does not also buy in the region where Company C buys. If Company A were to buy a 30 MHz MTA 1 license, then Company B and Company C would be prohibited from acquiring either of the BTAs because they would be over the 5 percent threshold for PCS spectrum in the same region.

* * * * *

5. Section 24.813 (a)(2) is amended by revising paragraph (a)(2) to read as follows:

(a) * * *

(2) A list of any party which holds a five percent or more interest (or a ten percent or more interest for institutional investors as defined in Section 24.720(h) of this part) in the applicant, or any entity in which a five percent or more interest (or a ten percent or more interest for institutional investors as defined in Section 24.720(h) of this part) is held by another party which holds a five percent or more interest (or a ten percent or more interest for institutional investors as defined in Section 24.720(h) of this part) in the applicant. (e.g., If company A owns 5% of Company B (the applicant) and 5% of Company C then Companies A and C must be listed on Company B's application.

* * * * *

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 94-107**

In the Matter of

Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana

**REPORT AND ORDER**

**Adopted: May 4, 1995; Released: May 19, 1995**

By the Commission:

## I. INTRODUCTION

1. In August 1994, the Louisiana Public Service Commission ("Louisiana PSC" or "LPSC"), on behalf of that state, petitioned us to retain state regulatory authority over the rates for intrastate commercial mobile radio services ("CMRS").[1] Nineteen parties filed pleadings relating to the Petition.[2] By this action, we deny the Petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

## II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.[3] Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;[4] (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;[5] and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.[6]

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of CMRS.[7] As an exception to this general rule, Congress also provided that, if a state had "any regulation" concerning the rates for any commercial mobile service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."[8]

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state seeking to retain regulatory authority must clear substantial hurdles" in demonstrating that continued regulation is warranted.[9] We also determined that the nature of a state's burden of proof is delineated generally by the statute itself. Specifically, we found that:[10]

> [I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [*sic*] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be

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[1] Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain existing Jurisdiction over Commercial Mobile Radio Services Offered with the State of Louisiana, PR Docket No. 94-107, filed August 1994 (hereinafter "Louisiana Petition").

[2] A list of parties that filed pleadings in this proceeding appears at Appendix A.

[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

[4] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (1994) (*CMRS Second Report and Order), reconsideration pending.*

[5] National Telecommunications and Information Administration Organization Act, § 113(b)(1).

[6] The competitive bidding methodology is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays..." 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

[7] *See* 47 U.S.C. § 332(c)(3)(A).

[8] *See* 47 U.S.C. § 332(c)(3)(B).

[9] *See CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[10] *Id.*, 9 FCC Rcd at 1421.

grounded on demonstrable evidence.[11] In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be pertinent and helpful to our consideration of a state petition.[12] Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.[13] We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.[14] In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising Federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."[15] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

## III. DECISIONAL FRAMEWORK

6. In order to prevail on the merits, the LPSC must sustain its statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[16] A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties' debate in this record. As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state's petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service[17] have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

7. Since the Budget Act does not explicitly construe or elaborate on the phrase "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory," we look to the "design of the statute as a whole and its object and policy" to give that phrase meaning.[18] We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also speak of just and reasonable rates.[19] We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive market operations.[20] The more formal description, however, is whether rates fall within a "zone of reasonableness" that is bounded at one end by the "investor interest in maintaining financial integrity and access to capital markets" and at the other by the "consumer interest in being charged non-exploitative rates."[21] Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by reference to carriers' costs and earnings,[22] but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.[23] These principles

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[11] *Id.*, 9 FCC Rcd at 1504.

[12] 47 C.F.R. § 20.13.

[13] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505.

[14] Under *Louisiana PSC*, the Commission may preempt State regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana Pub. Ser. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal policy. *See* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); National Ass'n of Reg. Util. Comm ners v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[15] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

[16] 47 U.S.C. § 332(c)(3).

[17] Although the provisions of Section 332(c)(3) of the Act apply to rate or entry regulation in the case of any commercial mobile radio service provider, the LPSC Petition is oriented to the provision of cellular service.

[18] *See* Crandon v. United States, 494 U.S. 152, 157 (1990); McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[19] *See* 47 U.S.C. § 201; *see also* 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

[20] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886 (para. 25), 2889-2900 (1989); *see also* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.

[21] *See, e.g.*, FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988); *see also* FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

[22] *See* FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs.") (citation omitted); *see also* Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05, *reh'g denied*, Bass v. FPC, 392 U.S. 917 (1968) (upholding ratemaking based upon area-wide average costs).

[23] *See, e.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

> Mobil's argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional "non-cost" incentives on the evidence of a need for increased supplies.

define basic components of a state's demonstration under Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a "zone of reasonableness," which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

8. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: "no State ... shall have any authority to regulate" CMRS rates.[24] As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) ("State Preemption"), express an unambiguous congressional intent to foreclose state regulation in the first instance.[25] Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation,[26] and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.[27]

9. Unlike some of the opponents of the LPSC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;[28] (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed "rapidly" through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal of stimulating economic opportunity and competition;[29] and (3) in contemplation of the deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.[30]

10. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving,[31] and it provided the resources (*e.g.*, additional spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.[32] Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.[33]

11. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of "market conditions" in the context of Section 332(c)(3) necessarily is governed by that framework.

12. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that Louisiana or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Commission established the two-carrier cellular market

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*Id.* at 316. *See also* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); Public Service Comm'n of New York v. FERC, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

[24] 47 U.S.C. § 332(c)(3).

[25] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[26] 47 U.S.C. § 332(c)(1)(A).

[27] 47 U.S.C. § 332(c)(1)(C).

[28] OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

[29] *See* OBRA § 6002(a), amending Section 309 of the Communications Act.a

[30] *See* 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

[31] The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. *See* Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international allocations decision making fora that recognized and permitted the use of such spectrum for PCS and other emerging technologies on a global scale. *See* Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. *See* OBRA § 6002(d)(2)(B).

[32] *See CMRS Second Report and Order*, 9 FCC Rcd at 1421; *see also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

[33] *Id.*

structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities.[34] Other Federal agencies have taken similar positions.[35] One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that "[w]hile GAO found no evidence of anticompetitive or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."[36] It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly prohibited state regulation of CMRS.[37] Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.[38]

13. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.[39] For example, we have attempted to heighten cellular competition at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between the two licensees in each local market.[40] We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.[41] Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

14. The framework of our CMRS regulatory policy -- moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by regulating existing licensees -- aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.[42] As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,[43] not a policy that is balkanized state-by-state.

15. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work. With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:[44]

> [i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

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[34] *See, e.g.*, Cellular Communications Systems, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

[35] *See* Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 ("[T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]"); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 ("[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market."), 10-12.

[36] United States General Accounting Office, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," GAO/RCED-92-220 (July 1992) (GAO Report).

[37] *Cf.* Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord* Miles v. Apex Marine Corporation, 489 U.S. 19 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Minneapolis & St. Louis Railway Co. v. United States, 361 U.S. 173 (1959).

[38] *Cf.* McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

[39] *See, e.g.*, GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. *See* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

[40] *See Cellular Resale Order*, 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry*), Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

[41] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

[42] If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

[43] See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

> [B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

[44] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

16. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impossible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that Congress would have established two separate statutory procedures -- one to govern our forbearance, and another to govern states' petitions[45] -- if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

17. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,[46] and such conditions can produce good results for consumers.[47] In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

18. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to perform a Structure-Conduct-Performance ("SCP") analysis,[48] which is a standard paradigm of modern industrial organization analysis.[49] This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the number of competitors, the cost structure, and the degree of integration with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry structure and allows us to determine whether and how consumer interests are being served by such activity.

19. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce "specific allegations of fact," to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding "anticompetitive or discriminatory practices or behavior by commercial mobile radio service providers."[50] We also requested "[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces," and we indicated that we would consider such evidence "especially probative."[51]

20. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,[52] and "an assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state."[53] We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.[54] In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on "trends" in each commercial radio provider's rates and customer base[55] and on "opportunities for new providers to enter into the provision of competing services" as well as an analysis of any barriers to such entry."[56] In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they see fit,[57] the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

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[45] *See* 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

[46] In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. *See* D. Carlton & J. Perloff, Modern Industrial Organization 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

[47] *See, e.g.*, W. Baumol, J. Panzar & R. Willig, Contestable Markets and the Theory of Industry Structure 15-46 (1982).

[48] Section 20.13(a)(1) requires states to include "demonstrative evidence" establishing failed market conditions. *See* 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. *See* 47 C.F.R. § 20.13(a)(2)(vi).

[49] *See, e.g.*, F. Scherer & D. Ross, Industrial Market Structure and Economic Performance, 4-7 (3d ed. 1990) ("Scherer and Ross"); D. Carlton & J. Perloff, Modern Industrial Organization, chs. 1, 9 (2d ed. 1994); J. Tirole, The Theory of Industrial Organization 1-3 (1988).

[50] 47 C.F.R. § 20.13(a)(2)(vi).

[51] 47 C.F.R. § 20.13(a)(2)(vii).

[52] 47 C.F.R. § 20.13(a)(2)(i) and (ii).

[53] 47 C.F.R. § 20.13(a)(2)(iv).

[54] 47 C.F.R. § 20.13(a)(2)(viii).

[55] 47 C.F.R. § 20.13(a)(2)(ii) and (iii).

[56] 47 C.F.R. § 20.13(a)(2)(v).

[57] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

21. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

22. While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.[58] Under the case law potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors,[59] and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in markets encompassing Louisiana have committed to pay substantial sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment.

23. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It *is* happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge that reasonably soon they will face new competition from PCS licensees.[60] The advent of PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.[61] Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantial and pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

24. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

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[58] *See, e.g.*, McCaw Personal Communications, Inc. v. Pacific Telesis Group, 645 F. Supp. 1166, 1174 (N.D. Cal. 1986) ("the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high"), *citing* United States v. Waste Management, Inc., 743 F.2d 976, 982- 83 (2d Cir. 1984). *See also* American Bar Association, I Antitrust Law Developments (Third) 307-11 (1992) and cases cited therein.

[59] *See* FTC v. Owens-Illinois, Inc., 681 F. Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning "the extensive present and future intermaterial competition in the glass and other packaging industries," "[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic"); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992)(*Merger Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: "In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact") (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

[60] *See, e.g.*, Comm. Daily, Apr. 24, 1995, "*Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS*" (report on independent researcher's projection of cellular service rate cuts up to 40%" over next two years); Comm. Daily, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is $24.99, with additional min. at 29 cents in home county, 99 cents elsewhere"); M. Mills, *Wireless: The Next Generation*, Wash. Post, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal -- Bell Atlantic, NYNEX Plan to Merge Their Mobile and Cellular Divisions as PCS Players Continue Consolidation*, InformationWeek, Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

[61] *See, e.g.*, Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 ("Description of Transaction and Public Interest Statement") at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending; Craig O. McCaw*, 9 FCC Rcd at 5862-63.

25. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the statutory goal of promoting investment in the cellular infrastructure. In that event, the rates underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

26. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic

**BROADBAND PCS AUCTION RESULTS**

| Louisiana | | | | | |
|---|---|---|---|---|---|
| MTA # | Freq. Blk. | State | Market | Winning Bidder | Winning Bid |
| M017 | A | Louisiana | New Orleans-Baton Rouge | WirelessCo, L.P. | $93,949,001 |
| M017 | B | Louisiana | New Orleans-Baton Rouge | PCS PRIMECO, L.P. | $89,475,484 |
| M007 | A | Texas | Dallas-Fort Worth | PCS PRIMECO, L.P. | $87,500,578 |
| M007 | B | Texas | Dallas-Fort Worth | WirelessCo, L.P. | $88,444,000 |
| M014 | A | Texas | Houston | American Portable Telecommunications, Inc. | $83,888,837 |
| M014 | B | Texas | Houston | PCS PRIMECO, L.P. | $82,680,425 |

factors.[62] For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.[63] Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.[64] Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

27. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to be persuasive. Those demonstrations that are tied most closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

## IV. LOUISIANA PETITION

28. The Louisiana Public Service Commission (LPSC) requests authority to continue exercising authority over the rates charged, services rendered, and the setting of other terms and conditions for CMRS.[65] Louisiana asserts that it maintained regulations concerning CMRS rates in effect as of June 1, 1993 and is petitioning to continue this rate regulation in order to benefit ratepayers.[66] The state asserts that such regulation consist of: (1) requiring companies to register to operate in Louisiana; (2) addressing customer complaints; (3) remedying discriminatory rates; (4) setting/approving interconnection rates that landline providers charge CMRS providers; (5) regulating rates by intervening when necessary, *e.g.*, in response to complaints; (6) monitoring rates; (7) remedying unlawful, anticompetitive and/or unwarranted practices; and (8) reviewing proposed mergers.[67] Louisiana also states that it requires any person wishing to do business as a cellular carrier in the state to file its identity, rate tariff, technical and service area information, *inter alia*, with the LPSC.[68]

29. The Louisiana Commission voted in July, 1994 to open a docket to investigate the merits of rate regulation for cellular and other wireless service providers, on a rate of return or some other basis.[69] The results of the investigation, the LPSC asserts, will include recommendations as to the type of regulation Louisiana should adopt. After the investigation, Louisiana states that it may file a petition to initiate additional rate regulation.[70] Pending the outcome of that proceeding, Louisiana requests continued authority to regulate cellular carriers as it has in the past.[71] The LPSC states that it intends to keep its current rules in place, but that it cannot now determine what additional or different rules may be required in the future. The LPSC argues in order to avoid rejudging issues it must complete its investigation before specifying a different regulatory structure than is in place today.[72]

## V. CASE ON THE MERITS

### A. *Louisiana's Case in Principal Part*

30. Louisiana asserts that the duopoly structure of the cellular services market results in rates which may be unjust and unreasonable.[73] The state also contends that cellular services may be priced far above cost, bringing in super normal profits, and carriers may be consciously engaging in parallel pricing and/or dividing markets.[74] Moreover, the LPSC argues, in certain local markets an "international" company (BellSouth) is competing against "a much smaller" cellular provider (Radiophone) that supports continued regulation "to protect it from BellSouth."[75] Substantial entry barriers still exist in the cellular market, according to Louisiana.[76] The LPSC also contends that there are no existing substitutes for cellular service, and that new services and technologies such as PCS and wide area Specialized Mobile Radio ("SMR") service are not viable competitors to cellular because their cost and pricing structures differ from cellular's and they are not yet widely available to consumers.[77]

31. The LPSC contends that it should be allowed to retain regulatory authority until the market can better produce high quality service at affordable rates.[78] Louisiana has been developing a comprehensive telecommunications plan, and it argues that its continued regulatory authority over CMRS rates is necessary to realize the plan's goals.[79] In addition, the LPSC states that it must be able to influence market participants in order to achieve the goal of universal service and allocate the costs of providing such service.[80]

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[62] *See, e.g.*, J. Tirole, The Theory of Industrial Organization 209-70 (1988).
[63] *Id.*, 239-270.
[64] In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.
[65] *See* Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana, PR Docket No. 94-107, at 1 (Louisiana Petition).
[66] *Id.* at 2.
[67] *Id.* at 7-23.
[68] *Id.* at 49.
[69] *Id.* at 2-3 n.2.
[70] *Id.*
[71] *Id.* at 40-41.
[72] *Id.* at 49.
[73] *Id.* at 23, 27-29.
[74] *Id.* at 28-29.
[75] Louisiana PSC Reply at 2-10.
[76] Louisiana PSC Petition at 30. In support of this assertion, the Louisiana PSC generally cites to the *CMRS Second Report and Order*.
[77] Louisiana PSC Reply at 11-12.
[78] Louisiana Petition at 30.
[79] *Id.* at 43. The LPSC also asserts that its regulatory framework is pro-competitive. *Id.* at 34-35.
[80] *Id.* at 46.

32. Louisiana also asserts that it should be allowed to retain rate regulatory authority in order to assess the level of competition in the Louisiana cellular market and to control rates as necessary, to compensate for any discovered supra-competitive rates.[81] The LPSC states that it is uniquely experienced and positioned to handle"[82] this task and, in particular, that it is more accessible to consumers, in terms of proximity, availability, and accountability, than the FCC.[83] The LPSC notes that this Commission refers complaints it receives from cellular subscribers in Louisiana to the LPSC for resolution.[84] Although the LPSC apparently believes the OBRA granted the FCC jurisdiction to address intrastate CMRS matters,[85] the LPSC claims that "[a]ny attempt by Congress and the FCC to preempt the authority of the LPSC to regulate the rates charged and services rendered by cellular providers is a violation of the Tenth Amendment of the United States Constitution."[86]

**B.** ***Pleadings of the Parties on Specific Matters***

**1. Market Conditions; Competition**

33. BellSouth, Century, GTE and McCaw assert that the LPSC failed to meet its burden by failing to show that current market conditions do not adequately protect consumers. BellSouth states that a showing that market conditions "may" fail to protect consumers does not suffice.[87] Century, McCaw, CTIA and GTE assert that Louisiana provides little or no evidence of the types identified by this Commission as relevant to the statutory showing, and that competition in the CMRS marketplace is likely to increase with the advent of SMR, PCS, and other services that will act as substitutes for cellular.[88] Century also asserts that the LPSC cannot rely on statements by the FCC and others to meet its burden, and the state fails to provide evidence of unique circumstances in Louisiana that would warrant a departure from the general preemptive action of the statute.[89]

34. Louisiana responds that Congress, the Department of Justice, and this Commission have expressed concern that competitive market conditions do not exist in each state, and this Commission also has determined that significant anti-competitive problems may exist because of the duopoly, and has found that cellular markets are not fully competitive.[90] Louisiana states that the Department of Justice reached similar conclusions as recently as July 1994.[91] It also asserts that the duopoly market conditions alone fail to protect Louisiana subscribers from unjust and unreasonable rates, and that its regulation is warranted because cellular rates in Louisiana are higher than in similar jurisdictions.[92]

**2. Paging and Other CMRS Services**

35. BellSouth notes that the LPSC seeks to regulate all CMRS services, including paging, but it submits no evidence concerning rates, market conditions, or discriminatory conduct by non-cellular CMRS providers other than to reference a case involving unauthorized solicitations.[93] AirTouch Paging agrees, and asserts that the paging industry is characterized by relatively low barriers to entry, a variety of frequencies, many facilities-based competitors, and healthy price competition.[94] AMSC states that Louisiana petition fails to make a specific showing as to Mobile Satellite Service.[95] AMSC urges the Commission to preempt state regulation of the MSS ground segment, based on the LPSC's failure to make a contrary showing, and based on past Commission policy of general preemptive action in similar instances.[96] AMTA, describing the high degree of competition among rates of private land mobile systems which have been reclassified as CMRS, opposes any state regulation of the entry or rates of such systems.[97] AMTA asserts that the petition is silent regarding intent to include reclassified private services within its regulatory framework, and the state provides no evidence that market conditions in this segment of the CMRS industry do not adequately protect subscribers.[98]

**3. Customer Complaints; Allegations of Anticompetitive or Collusive Conduct**

36. BellSouth argues that the customer complaints cited by the Louisiana Commission are largely irrelevant. The carrier contends that the LPSC concedes that it has not determined whether the complaints are evidence of a widespread problem demonstrating current market failure.[99] In addition, BellSouth claims, the alleged instances of anticompetitive conduct are similar to interexchange carrier promotions permitted by this Commission.[100] In any event, BellSouth asserts, individual cases of possible discriminatory rates or practices can be addressed by this Commission under Sections 201, 202 and 208 of the Communications Act, 47 U.S.C. §§ 201, 202 and 208.[101] Regarding Louisiana's allegations of impermissible tying arrangements, Century asserts that bundling of cellular service and equipment already has been addressed by the FCC.[102]

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81 *Id.* at 38-39.
82 Louisiana PCS Reply at 15.
83 *Id.* at 15-16; Louisiana Petition at 31.
84 Louisiana PSC Reply at 15-16; Louisiana Petition at 9-10.
85 *See* Louisiana Petition at 9 n.4.
86 Louisiana Reply at 16.
87 Comments of BellSouth Corp., on behalf of BellSouth Cellular Corp. and Mobile Communications Corp. of America (collectively, BellSouth), at 2, 4-6, 12-13 & nn.10, 11); *accord* McCaw Comments at 3, 11-15.
88 *See* Century Comments at 7-8; CTIA Comments at 18-24; GTE Comments at 12-16, 21 & app. A at 8; McCaw Comments at 3.
89 Century Comments at 7-8.
90 Louisiana Reply at 3-4, *citing CMRS Second Report and Order.*
91 *Id.* at 4-5, *citing* United States v. Western Electric, Memorandum of the United States in Response to Bell Companies' motion for Generic Wireless Waivers, Civ. Action No. 82-0192 (filed July 25, 1994).
92 *Id.* at 6-7.
93 BellSouth Comments at 14 & n.12.
94 AirTouch Paging Comments at 8-9.
95 AMSC Comments at 1-2.
96 *Id., citing* 9 FCC Rcd 1411, para. 41 (1994).
97 AMTA Comments at 1, 6-7; *accord* E.F. Johnson Comments (requesting exemption of "local" SMR and 220 MHz land mobile systems from state rate regulation).
98 *Id.* at 5-7.
99 BellSouth Comments at 19.
100 BellSouth Comments at 22-23.
101 BellSouth Comments at 23.
102 Century Comments at 2.

**4. Effect of State Regulation**

37. BellSouth, CTIA and McCaw argue that state regulation results in higher rates.[103] The state responds that many parties attribute successes in the CMRS marketplace to "competition" and failures to "regulation." In response to arguments that the broadening customer base for cellular service in Louisiana is evidence of pro-competitive rates, Louisiana asserts that such broadening may be attributable to nothing other than declining cellular handset costs, rather than any decrease in service rates, and thus is not persuasive evidence of conditions in the cellular service market. Even assuming rates are decreasing, Louisiana argues, there is no evidence that the new rates are just and reasonable.[104] Louisiana also asserts that BellSouth and McCaw offer no evidence of how regulation has increased rates in Louisiana, and notes that BellSouth does not promise to reduce rates if cellular service is deregulated.[105] Indeed, the PSC notes that McCaw's claim that regulation has increased rates in Louisiana is at odds with that company's assertion that its rates have dropped twenty percent in the past two years.[106] The LPSC states that higher rates may indicate inadequate competition and a need for increased regulation, not any flaw in regulation.[107] Moreover, the LPSC notes that McCaw's economic consultant in this proceeding suggests that prices in a regulated environment would be *below* an efficient level, not that they would be too high.[108]

**5. Timing**

38. BellSouth contends that there is no statutory support for continuing rate regulation pending the completion of the Louisiana investigation.[109] BellSouth and McCaw assert that a state may petition to continue rate regulation only to the extent that it actually regulated rates as of June 1, 1993, and argue that the LPSC seeks to continue rate regulations that were not in effect on June 1, 1993.[110] Louisiana replies that the petition seeks extension of the state's existing regulatory authority, not particular regulations.[111]

**C. *Discussion***

39. Section 332(c)(3) provides that a state petition shall be granted if it "demonstrate[s]" that market conditions for the service at issue fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates. The LPSC has failed to make such a demonstration and, accordingly, we deny its petition.

40. The question whether CMRS market conditions in Louisiana are such that consumers require regulatory protection can be answered only upon consideration and analysis of tangible evidence concerning the structure, conduct and performance of that market, and the LPSC has not provided such evidence. It has submitted little or no data on CMRS infrastructure investment, earnings, the deployment of new services and technology, or existing service prices or pricing trends. Nor has it presented other information that would support a finding that CMRS licensees are restricting output or otherwise acting in an anti-consumer or anti-competitive manner. Although the LPSC has submitted information on consumer complaints, it consists essentially of a rough estimate of the number of complaints received last year concerning all commercial mobile radio services, and a laundry list of the various practices of which consumers complained.[112] No specific information is provided about those practices, or whether and how they were addressed by the LPSC. This evidence is not adequate to support a conclusion that market conditions fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.

41. Indeed, it appears the LPSC itself has not made such a finding. Rather, the LPSC essentially asserts that market conditions may" fail to protect subscribers in Louisiana. Although prior to filing its petition the LPSC initiated an proceeding to address that issue more definitively, the investigation apparently is now being held in abeyance.[113] The relevant observation is that statements of uncertainty regarding market conditions do not satisfy the statute's requirement that a state "demonstrate" that market conditions fail to protect subscribers adequately. Accordingly, we deny Louisiana's petition.[114]

42. As a result of our decision, the State of Louisiana is precluded by Section 332(c)(3) from regulating the rates charged" by any CMRS provider. The LPSC's claim that the Tenth Amendment bars that result is neither explained nor supported, so it is not possible to respond to that claim in detail. We do note that the Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law;[115] and where, as here, a federal agency acts within the scope of congressionally delegated authority, its actions have the same effect.[116] Finally, we note that while the LPSC and several parties suggest that the OBRA has given this Commission jurisdiction over intrastate CMRS,[117] nothing on this record persuades us that it is necessary to address questions concerning our jurisdiction in order to act on the merits of the LPSC Petition.

## VI. REGULATION OF OTHER TERMS AND CONDITIONS

43. Prior to the OBRA, Section 332 prohibited the states from imposing "rate ... regulation" upon certain wireless

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[103] BellSouth Comments at 3-4, 26-27, app. at 4-8 (Affidavit of Economist Dr. R. Rozek); CTIA Comments at 13; McCaw Comments at 29-33.

[104] Louisiana Reply at 5.

[105] *Id.* at 6-7 & n.2.,

[106] *Id.* at 7 n.2, *citing* McCaw Opposition at 23.

[107] Louisiana Reply at 7 n.2.

[108] *Id.* at 7 n.3, *citing* Owen Affidavit on behalf of McCaw, at 17.

[109] BellSouth Comments at 15-16.

[110] BellSouth Comments at 2-3; McCaw Comments at 18-20.

[111] Louisiana Reply at 3.

[112] *See* Louisiana Petition at Exhibit 11.

[113] *See* Letter from B. Almond, Executive - Federal Regulatory, BellSouth, to Deputy Chief, Policy Division, Wireless Telecommunications Bureau (Dec. 8, 1994) (attaching minutes of November 9, 1994, open session of the LPSC which described the LPSC's vote to delay its investigation).

[114] Our decision on the merits of this issue makes it unnecessary to address the question whether Louisiana was exercising rate regulation authority as of June 1, 1993.

[115] *See* Jones v. Rath Packing Co., 430 U.S. 519 (1977); *see also* Louisiana PSC, 476 U.S. at 368-69 and cases cited therein.

[116] Louisiana PSC, 476 U.S. at 369; Capital Cities Cable, Inc. v Crisp, 467 U.S. 691, 698-99 (1984).

[117] *See* Louisiana Petition at 9 n.4; BellSouth Comments at 23.

telecommunications carriers.[118] This prohibition was construed broadly to include almost all regulatory activity.[119] Post amendment, Section 332(c)(3) now prohibits states from regulating "the rates charged" for CMRS, but it expressly reserves to them the authority to regulate the "other terms and conditions of commercial mobile services." Although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the LPSC is entitled to continue, despite our denial of its Petition.

44. The House of Representatives Committee on Energy and Commerce, reporting the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states may nonetheless regulate other terms and conditions of commercial mobile radio services. The Committee stated:[120]

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

45. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented here. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

46. First, although the LPSC may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS, it does not follow, for example, that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.[121] In consequence, it is conceivable that matters might arise under complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit the LPSC to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

47. Under the same logic, we also conclude that several other aspects of Louisiana's existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the LPSC or whatever other agency the state decides is appropriate does not strike us as rate regulation, so long as nothing more than standard informational filings are involved. Nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Finally, we note that Louisiana's regulation of the interconnection rates changed by landline telephone companies to CMRS providers appears to involve rate regulation only of the landline companies, not the CMRS providers, and thus does not appear to be circumscribed in any way by Section 332(c)(3).

48. We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of Louisiana's existing regulation practice at issue.

## VII. ORDERING CLAUSES

49. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. 332(c)(3), IT IS ORDERED that the Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing

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[118] The statute provided in relevant part that "[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . . ." 47 U.S.C. § 332(c)(3) (prior to revisions enacted by OBRA).

[119] *See, e.g.*, Telocator Network of America v. FCC (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission's interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). *See also, e.g.*, American Teltronix (Station WNHM552), 3 FCC Rcd 5347 (1988)("Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier."), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990)(note omitted) ("state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute .... [A]ccompanying legislative history reveals that Congress recognized the Commission's broad discretion to dictate which land mobile systems are to be regulated as private."). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission's Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 para. 24 n.19) (1990):

> If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

[120] *See* H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 261 ("House Report").

[121] *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a)(emphasis added).

Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana IS DENIED for the reasons set forth above.

50. IT IS FURTHER ORDERED, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order SHALL BE FILED within thirty days of the day after the day on which public notice of this action is given.[122]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**APPENDIX A Parties**

**Filing Comments or Replies**

AirTouch Paging

AMSC Subsidiary Corporation (AMSC)

American Mobile Telecommunications Association, Inc. (AMTA)

BellSouth Corp., on behalf of BellSouth Cellular Corp. and Mobile Communications Corp. of America (collectively, BellSouth)

Cellular Telecommunications Industry Assoc. (CTIA)

Century Cellunet, Inc. (Century)

E.F. Johnson Company (E.F. Johnson)

GTE Service Corp., on Behalf of GTE Mobilnet Incorporated and Contel Cellular Inc. (GTE)

Louisiana Public Service Commission (Louisiana, LPSC)

McCaw Cellular Communications, Inc. (McCaw)

Mercury Cellular Telephone Company and MobileTel, Inc. (Mercury and MobileTel)

Mobile Telecommunication Technologies Corp. (MTel)

National Cellular Resellers Association (NCRA)

Nextel Communications, Inc. (Nextel)

PageMart, Inc.

Paging Network, Inc. (PageNet)

Personal Communications Industry Association (PCIA)

Radiofone, Inc.

Rural Cellular Association

[122] Although we assigned the LPSC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Sammons Communications, Inc. CUID Nos.
IN0001, Columbus;
IN0002, Bartholomew County;
IN0686, Garden City;
IN0687, Newbern;
IN0688, Ogilville;
IN0689, Petersville;
IN0690, Rosstown;
IN0691, Taylorsville;
IN0692, Walesboro;
IN0693, Waynesville;
IN0194, New Albany

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 1995; Released: April 4, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Forms 393 in response; Operator also filed amended Form 393 filings on June 24, 1994 and supplemental filings on February 6, 1995.[11] On March 8, 1995, Operator responded to a Commission letter which requested further clarification of Operator's showings.[12]

5. In its supplemental filings of February 6, 1995, Operator calculated maximum permitted rates per month (plus franchise fee) for the CPS tier as set forth in Appendix B. Upon review of these filings, we have found no apparent errors that would require a recalculation of these maxi-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan.20, 1995) (together, *Public Notice)*.

[12] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (February 24, 1995).

mum permitted rates. However, Operator's actual monthly charges for its CPS tier were higher than the maximum permitted rates (*see* Appendix B). Thus, Operator has failed to demonstrate that the actual charges for its CPS tier were at or below the maximum permitted rates.

6. Upon review of the record herein, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[13]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas referenced in the caption and at Appendix A ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[14] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

12. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS prices in the franchise areas addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith optional supplemental filings in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| IN0001 | 2/10/94 | 2/8/94 |
| IN0002 | 2/10/94 | 2/8/94 |
| IN0686 | 2/10/94 | 2/8/94 |
| IN0687 | 2/10/94 | 2/8/94 |
| IN0688 | 2/10/94 | 2/8/94 |
| IN0689 | 2/10/94 | 2/8/94 |
| IN0690 | 2/10/94 | 2/8/94 |
| IN0691 | 2/10/94 | 2/8/94 |
| IN0692 | 2/10/94 | 2/8/94 |
| IN0693 | 2/10/94 | 2/8/94 |
| IN0194 | 2/28/94 | 2/26/94 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| IN0001 | $10.47 | $10.13 |
| IN0002 | $10.47 | $10.15 |
| IN0686 | $10.47 | $10.15 |
| IN0687 | $10.47 | $10.15 |
| IN0688 | $10.47 | $10.15 |
| IN0689 | $10.47 | $10.15 |
| IN0690 | $10.47 | $10.15 |
| IN0691 | $10.47 | $10.15 |
| IN0692 | $10.47 | $10.15 |
| IN0693 | $10.47 | $10.15 |
| IN0194 | $11.55 | $10.87 |

[13] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Peninsula Cable TV, Madeira Beach, Florida — CUID Nos. FL0304, FL0305, FL0335 and FL0336

Benchmark Filing to Justify Cable Programming Service Rates

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 1995; Released: April 4, 1995**

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Peninsula Cable TV ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Cox Cable Greater Ocala, Inc. CUID No. FL0161
Ocala, Florida

Benchmark Filing To Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 1995; Released: April 4, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. Here we consider a complaint about the price Cox Cable Greater Ocala, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in its City of Ocala, Florida franchise area, CUID No. FL0161. The Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of the Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

## II. PROCEDURAL MATTERS

4. A complete and timely CPS complaint was completed and served on Operator for CUID No. FL0161 on October 18, 1993. It was received by the Commission on November 12, 1993.[11]

5. Operator filed a Form 393 with the Commission on November 15, 1993. Operator submitted additional information on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

## III. DISCUSSION

6. Operator's monthly CPS price of $12.24 is higher than the maximum permitted per channel price of $12.05 as calculated in its February 7, 1995 filing. Thus, Operator has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate. Furthermore, upon review we have determined that Operator has not correctly calculated its maximum permitted price, and

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the cable operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the cable operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in the cable operator's price for the period after May 14, 1994 may be required to reflect the fact that the cable operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator did not comply with 47 C.F.R. § 76.956(a), which requires it to state when the complaint was served upon it. Under these circumstances, we will consider the mailing date supplied by the complainant as the service date.

[12] Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan.20, 1995) (together, *Public Notice)*.

it is therefore appropriate to make the following adjustments to its calculations in Form 393 in addition to those already made by Operator in its February 7, 1995 filing:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (i.e., a subchapter "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[13] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered in Part II, Worksheet 1, Line 104 should have been close or identical to its equipment cost figure on Part II, Step G, Line 34.[14] However, Operator's entries on these two lines were different. Accordingly, on Line 104 we enter $73,480, which includes the correctly grossed-up tax entries.

c. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we will set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its Form 393, Operator apparently calculated the Inflation Adjustment Factor using data it relied on when it set its $12.24 CPS price. If based on this data Form 393 indicated that Operator's price was reasonable, then Operator would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.[15] However, Operator has not shown that its price was reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator timely filed FCC Form 393.[16] On July 29, 1994, the U. S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the month preceding Operator's required Form 393 filing date of November 17, 1993,[17] of 1.030.

## IV. CONCLUSIONS

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $11.99 per month (plus franchise fee) for the period starting on November 12, 1993 and ending on May 14, 1994 for CUID No. FL0161.[18]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Cox Cable Greater Ocala, Inc., in Ocala, Florida, CUID No. FL0161, IS GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Cox Cable Greater Ocala, Inc. shall refund to subscribers in the franchise area designated by CUID No. FL0161 that portion of the amount paid for cable programming service from November 12, 1993[19] to May 14, 1994, that exceeded $11.99 per month (plus franchise fee) and was thus unreasonable, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Cox Cable Greater Ocala, Inc. shall promptly determine the overcharges to CPS subscribers in CUID No. FL0161 for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Cox Cable Greater Ocala, Inc. shall, within 30 days of the release of this Order, revise its Form

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[13] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[14] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations... operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[15] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] The Inflation Adjustment Factor is calculated using the number of whole months between September 30, 1992, and the date of filing. FCC Form 393, page 11, instructions for Line 124.

[18] This finding is based solely on the representations of the cable operator listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[19] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

1200 filing for CUID No. FL0161 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).[20]

12. IT IS FURTHER ORDERED that Cox Cable Greater Ocala, Inc. shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a CPS tier price for CUID No. FL0161 that reflects the reduction in the CPS rate determined in this Order.

13. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in the franchise area addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

[20] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Sammons Communications, Inc. CUID No. KY0061, Bell County

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 1995; Released: April 5, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in Bell County, Kentucky. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing..[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint was served on Operator on November 9, 1993 and was received by the Commission on November 15, 1993. Operator filed FCC Form 393 in response; Operator also filed an amended Form 393 filing on June 24, 1994 and a supplemental filing on February 6, 1995.[11] On March 8, 1995, Operator responded to a Commission letter which requested further clarification of Operator's showing.[12]

5. In its amended benchmark filing of June 24, 1994, Operator calculated a maximum permitted rate for the CPS tier of $7.55 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Operator's actual monthly charge for its CPS tier was $7.67 (plus franchise fee). Thus, Operator has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

6. Upon review of the record herein, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $7.55 per month (plus franchise fee) for the period from November 15, 1993 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

[12] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (February 24, 1995).

[13] This finding is based solely on the representations of Oper-

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Operator in Bell County, Kentucky IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in Bell County, Kentucky that portion of the amount paid for cable programming service for the period from November 15, 1993[14] to May 14, 1994 which exceeded $7.55 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Bell County, Kentucky, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $7.55 (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

12. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in Bell County, Kentucky for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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ator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI of South Florida — CUID No. FL0500 (Hollywood)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 1995; Released: April 5, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on May 17, 1994.

5. In its amended benchmark filing of May 17, 1994, Operator calculated a maximum permitted price for the CPS tier of $10.14 per month. However, Operator's actual price for the CPS tier was $11.11 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's submission we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[11] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n. 195.

[11] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also* Cable Television Rate Regulation Questions and Answers Relating To

could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. On Line 108 of Form 393, Part II, Worksheet 1, Operator entered a monthly franchise fee expense of $20,658.98. Similarly, on Line 208 of Form 393, Part II, Worksheet 2, Operator entered a monthly franchise fee expense of $19,623.51. The instructions to Form 393 provide that franchise fees are to be deducted on Lines 108 and 208 only if they are included in the charges listed on Form 393, Part II, Worksheet 1, Line 101 and Worksheet 2, Line 201. However, the rate cards Operator provided with its May 17, 1994 filing indicates that the prices entered by Operator on Lines 101 and 201 for the basic and CPS tiers, do not include franchise fees.[12] Accordingly, we have reduced Operator's Lines 108 and 208 entries to $0.00 per month.

c. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operator filed.[13] On its amended Form 393s, Operator calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Operator used in justifying its rates for the franchise area under consideration in this Order, of 1.034.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $10.40 (plus franchise fee) for the period from the filing of the earliest complaint (as set forth in Appendix A) to May 14, 1994.[14]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referred to in Appendix A against the cable programming service price charged by Operator in the area referenced in the caption and at Appendix A herein IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community referenced herein that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint (as set forth on Appendix A)[15] to May 14, 1994 which exceeded $10.40 (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price (plus franchise fee).[16]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| FL0500 | 2/28/94 | 2/28/94 |

FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[12] On Worksheet 1, Line 101, Operator entered $12.17 for the basic tier and $11.11 for the CPS tier. On Worksheet 2, Line 201, Operator entered $13.95 for the basic tier and $8.90 for the CPS tier.

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[16] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Concord TV Cable CUID No. CA0063, Concord, CA

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 1995; Released: April 5, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price Concord TV Cable ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 4780 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed an FCC Form 393 submission in response to this rate complaint; Operator has also filed amended and supplemental Form 393 filings, most recently on March 15, 1995, in response to an inquiry by Commission staff.[11]

5. On November 15, 1993, Operator filed a Motion to Dismiss the complaint referenced in Appendix A. In its motion, Operator requests that the Commission dismiss the complaint for a number of reasons. First, Operator asserts that the complainant incorrectly answered question number 9 on FCC Form 329 as it then existed because she listed in her complaint channels that were sold on the basic service tier as well as channels that were offered on the CPS tier. In addition, Operator urges the Commission to find the complaint deficient on the ground that the complainant incorrectly answered question number 8. Operator argues that the challenged rate as listed by the complainant includes basic rates and therefore does not indicate what rate the complainant finds unreasonable. Operator's assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the man-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Opeartor implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

[11] For example, Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

date of the 1992 Cable Act. Because the complainant's response to question number 9 includes channels contained on the CPS tier and because the rates listed in answer number 8 and on the attached bill indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate and that she believed that rate was unreasonable.[12] We therefore find the complaint referenced in Appendix A valid and deny Operator's Motion to Dismiss. Operator also disputes the validity of subsequent complaints filed by other cable subscribers. Because we have accepted the complaint referenced in Appendix A as properly filed, we find it unnecessary to rule on Operator's objections to these later filed complaints.

6. Operator asserts that its monthly CPS tier price is justified by its benchmark filing because its price is lower than or equal to the maximum permitted charge as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In response to the Commission's rate regulations, on September 1, 1993, Operator restructured its rates. This restructuring, however, is not reflected on Line 101 of Worksheet 1 of Part II of Operator's FCC Form 393. Instead of entering its currently effective tier prices, as required by the directions for Line 101, Operator entered its previously effective tier prices.[13] Accordingly, Worksheet 1 was adjusted to reflect current tier charge information.

b. Operator's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figure it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entry.[14] However, Operator's entry on Line 104 differed substantially from its entry on Line 34. We therefore adjusted Line 104 to equal the amounts entered on Line 34.

7. Because of these errors, we conclude that Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[15] On its Form 393, Operator entered 13 months on Line 124, indicating that it calculated the Inflation Adjustment Factor through October 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates, of 1.030.

8. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator's showing supports the maximum reasonable CPS tier price shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[16]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that Operator's motion to dismiss the complaint referenced in Appendix A against the cable programming service price charged by Operator in the area referenced above and at Appendix A herein IS DENIED.

10. IT IS FURTHER ORDERED that the complaint referred to in Appendix A against the cable programming service price charged by Operator in the area referenced above and at Appendix A herein, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Operator justifies the maximum reasonable price set forth in Appendix B (plus franchise fee) for Operator's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community addressed herein that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint (as set forth on Appendix A)[17] to May 14, 1994 which exceeded the maximum price set forth in Appendix B (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing

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[12] We note that in January 1994 the Commission released a revised Form 329 that omitted question 9.

[13] The instructions for Line 101 of FCC Form 393 state: "In the relevant column, enter your *current* monthly charge for your basic service tier and for each tier of cable programming service that you offer to subscribers in the community unit for which the form is being completed." (emphasis added) (footnote omitted).

[14] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price set forth in Appendix B (plus franchise fee).[18]

15. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in the franchise area addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| CA0063 | 10/8/93 | 10/4/93 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| CA0063 | $11.75 | $11.54 |

[18] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Crown Cable Wisconsin, Inc. | CUID Nos. |
| | WI0043, Janesville, WI |
| | WI0066, Hartford, WI |
| | WI0265, West Allis, WI |
| | WI0604, LaCrosse, WI |
| | WI0659, Mishicot, WI |

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 1995; Released: April 5, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices Crown Cable Wisconsin, Inc.[1] ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. The first valid CPS complaints in the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on February 17, 1995, in response to an inquiry by Commission staff.[12]

5. On March 31, 1994, Operator filed a Motion to Dismiss the complaint in CUID No. WI0604 because the complainant, a municipal entity, failed to submit a copy of its cable bill. We do not require municipal entities to submit cable bills since they are not expected to subscribe to the cable service at issue. Accordingly, we deny Operator's motion. On December 23, 1993, Operator filed a Motion to Dismiss the complaint in CUID No. WI0659 because the complainant failed to complete question number 12 on FCC Form 329. We note that although the complainant failed to certify that he was sending a copy of the complaint to Operator, he did indicate the date on

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[1] On January 18, 1995, Marcus Cable Partners, L.P. purchased all of the Wisconsin cable systems owned by Crown Cable Wisconsin, Inc. As required by the context, the term "Operator" as used in this Order includes Operator's successors in interest.

[2] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Opeartor implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] For example, Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

which he mailed the complaint to Operator. Operator admits that it timely received the complaint. Hence, Operator's assertions do not perusade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. We therefore find the complaint valid and deny Operator's motion.

6. Operator asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than or equal to the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. Operator's Form 393, Worksheet 1, Line 104 entries do not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figures it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entries.[13] However, Operator's entries on Line 104 differed substantially from its entries on Line 34. We therefore adjusted Line 104 to equal the amounts entered on Line 34.

b. In Column G of Schedules A and C of Part III of its FCC Forms 393, Operator did not report any income tax expense due to a net operating loss.[14] Operator is a Subchapter C corporation and is therefore required to pay corporate income tax.[15] Therefore, Operator must complete Column G on the basis of its statutory tax rate, regardless of the rate it actually paid in any given year.[16] By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore calculate Operator's federal income tax allowance on Column G of Schedules A and C on the basis of a 34% corporate tax rate.[17] Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[18] In accordance with this principle, we recalculate Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 51.51% of Operator's return on investment.

c. For CUID No. WI0659, in Line 101 of Worksheet 1 of Part II of its FCC Form 393, Operator did not correctly enter its monthly tier charges as of the initial date of regulation. Accordingly, Worksheet 1 was adjusted to reflect tier charge information consistent with the rate card as submitted by Operator and with the rates Operator reported on Form 393, Part I.

7. Because of these errors, we conclude that Operator has failed to demonstrate that its prices for the CPS tier were not unreasonable. We will therefore set prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[19] On its Forms 393, Operator entered 12 months on Line 124, indicating that it calculated the Inflation Adjustment Factor through September 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date Operator used in justifying its rates, of 1.028.

8. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[20]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the Operator's motions to dismiss the complaints referenced in Appendix A against the cable programming service prices charged by Operator in the areas referenced above and at Appendix A herein ARE DENIED.

10. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Crown Cable Wisconsin, Inc. in

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[13] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[14] Facsimile from Amy M. Walker, Regulatory Manager, Marcus Cable, to FCC (Feb. 17, 1995).

[15] *Id.*

[16] *See* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 15 (released July 30, 1993).

[17] Facsimile from Amy M. Walker, Regulatory Manager, Marcus Cable, to FCC (Feb. 17, 1995).

[18] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[19] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[20] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[21] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

12. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

13. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[22]

14. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

15. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS prices in the franchise areas addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith optional supplemental filings in response to our Public Notice.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| WI0043 | 2/24/94 | 2/24/94 |
| WI0066 | 1/31/94 | 1/24/94 |
| WI0265 | 2/28/94 | 2/28/94 |
| WI0604 | 2/28/94 | 2/28/94 |
| WI0659 | 11/22/93 | 11/16/93 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| WI0043 | $11.88 | $11.67 |
| WI0066 | $12.38 | $12.08 |
| WI0265 | $10.27 | $10.01 |
| WI0604 | $15.25 | $14.96 |
| WI0659 | $12.78 | $12.12 |

[21] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[22] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

BBC LICENSE SUBSIDIARY L.P. (Assignor) — File Nos. BALCT-941014LH, BALTT-941014LI

and

SF GREEN BAY LICENSE SUBSIDIARY, INC. (Assignee)

For Assignment of Licenses of WLUK-TV, Green Bay, Wisconsin, and W40AN, Escanaba, Michigan

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 27, 1995; Released: April 27, 1995**

By the Commission: Commissioners Barrett and Ness issuing separate statements.

1. The Commission has before it for consideration the above-captioned applications seeking consent to the assignment of licenses of WLUK-TV, Channel 11, Green Bay, Wisconsin, and television translator station W40AN, Escanaba, Michigan, to SF Green Bay License Subsidiary, Inc. (SF Green Bay).[1] NBC, Inc. (NBC) timely filed a petitio to deny the applications,[2] SF Green Bay opposed that petition, and NBC replied. On February 22, 1995 and March 30, 1995, the Commission staff sent letters of inquiry to SF Green Bay, which responded to the letters on March 8, 1995 and on April 3, 1995, respectively. In the meantime, on February 24, 1995, NBC requested dismissal of its petition to deny. The dismissal request is currently pending. Even were we to grant NBC's request for withdrawal, we remain obliged to consider the merits of its allegations against the subject applications. *Booth American Company*, 58 FCC 2d 553, 554 (1976). Without deciding whether a network, such as NBC, has standing to oppose the assignment of one of its own network affiliates to a party owned in part by a competing network, we will now address the merits of the petition to deny.[3]

**BACKGROUND**

**Ownership of the proposed assignee**

2. Savoy Pictures Entertainment, Inc. (Savoy Pictures) is a publicly traded entertainment company whose principal business is financing, marketing and distributing major motion pictures. Fox Television Stations, Inc. (FTS) is currently the licensee of eight television stations and an affiliate of Fox Broadcasting Company, a television network. Savoy Pictures, through its Savoy Stations, Inc. (collectively, Savoy), and FTS, through its FTS Investments, Inc. (collectively, Fox), have recently formed a hierarchy of companies through which they propose to acquire from BBC License Subsidiary L.P., a unit of Burnham Broadcasting Company L.P. (collectively, Burnham), WLUK-TV, Green Bay, Wisconsin, and television translator W40AN, Escanaba, Michigan. The proposed licensee of the broadcast stations, SF Green Bay, is wholly owned by SF Broadcasting of Green Bay, Inc., which, in turn, is wholly owned by SF Broadcasting of Wisconsin, Inc. (SF Wisconsin).

3. In Exhibit 1 to its applications, SF Wisconsin[4] concludes that Fox is not a party, because Fox's stockholdings in SF Wisconsin consist of only nonvoting common and preferred shares. Savoy, according to the applications, holds all of the outstanding Class A common stock, which represents all of the company's voting stock and 75 percent of its "common stock equity," while Fox holds all of the Class B nonvoting common stock, which carries no initial voting rights and represents 25 percent of the "common stock equity."[5] Although the purchase price for each share of common stock is $146,666,[6] under the terms of the SF Wisconsin Subscription and Stockholders Agreement (Stockholders Agreement), Fox is to pay in an additional $100,000 for each of its shares of common stock, or an extra $2.5 million.

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[1] By amendment of March 8, 1995, the applications were amended to reflect that SF Green Bay is to be the proposed licensee. The operating assets of WLUK-TV will be held by the original proposed licensee, SF Broadcasting of Green Bay, Inc., the immediate parent of SF Green Bay, who will lease those assets to its subsidiary. In the event of a future assignment or transfer of WLUK-TV, we require that the assets be conveyed with the license. *See, e.g., Radio KDAN, Inc.*, 11 FCC 2d 934, 935 (1968)(Commission policy bars sales of bare licenses).

[2] AFLAC Broadcast Group, Inc., Cosmos Broadcasting Corporation, and Evening Post Publishing Company submitted letters in support of NBC's petition.

[3] We note that issues raised by NBC in this proceeding have largely been repeated or incorporated by reference by the Counsel for the Louisiana State Conference of Branches of the NAACP and the New Orleans Branch of the NAACP in a proceeding involving the assignment of license of WVUE(TV), New Orleans, Louisiana. File No. BALCT-941031KK. The proposed assignment of WVUE(TV) is to SF New Orleans License Subsidiary, Inc., an entity whose ultimate parent company, SF Multistations, Inc. is a Savoy-Fox venture nearly identical in structure to that of SF Green Bay's ultimate parent here. To the extent the issues and record with respect to attribution are the same, our conclusions will apply with equal force to the WVUE(TV) proceeding. Remaining issues there will be addressed when we act upon the application in that case.

[4] For ease of reference, we shall refer to the applicant as SF Wisconsin, which, in fact, is the ultimate parent company of the applicant, SF Green Bay.

[5] Fox will own 25 shares of Class B nonvoting common stock and Savoy will own 75 shares of Class A common stock in SF Wisconsin.

[6] It is reported that Savoy will pay in $11 million for 75 shares of common stock, giving each share a purchase price of $146,666.

4. In the Stockholders Agreement, Savoy grants to Fox an irrevocable option, exercisable for up to one year following the acquisition of WLUK-TV, to purchase an amount of shares from Savoy such that Fox and Savoy will each own one-half of the shares of common stock.[7] All stock purchased by Fox from Savoy will be Class B common, entitling Fox to no voting rights upon exercise of the option. However, commencing approximately three weeks prior to the third anniversary of the Stockholders Agreements,[8] Fox may, in its sole discretion, exchange all of its Class B nonvoting shares for an equal number of Class A voting shares, subject to "receipt of any necessary regulatory approvals." Upon conversion, if it has exercised its option in whole, Fox would hold negative control of SF Wisconsin.

5. As to SF Wisconsin preferred stock, Fox holds 3,000 shares,constituting all such outstanding stock, at a purchase price of $3 million, or $1,000 per share. The preferred stock carries no voting or conversion rights and pays no dividends. Fox may redeem its preferred stock at the end of a calendar year or upon sale of the station to the extent the value of WLUK-TV exceeds a compound annual growth factor of 15 percent.[9] The maximum amount to be paid for redemption of the preferred stock is $3 million, the amount paid in by Fox. In the event of liquidation or dissolution of SF Wisconsin, Fox shall not be entitled to receive, or be paid out of the SF Wisconsin assets available for distribution to stockholders, any payment in respect of its preferred stock beyond that which is redeemable based upon the increase-in-value formula.

**Governance of the proposed assignee**

6. The business and affairs of SF Wisconsin,[10] as set forth in that company's Amended and Restated By-Laws, will be managed by or under the direction of the board of directors. Initially, the SF Wisconsin board is composed of three directors: two Savoy principals, Victor Kaufman and Lewis Korman, and a former Fox employee, Thomas Herwitz. In response to the staff's inquiry as to how the initial directors were selected, SF Wisconsin represents in its March 8, 1995 response that at the time of the initial discussions with respect to the formation of an entity to acquire television stations, Savoy and Fox "agreed" that Kaufman, Korman and Herwitz would be the initial directors. Each initial director is slated to serve a three-year term, ending on October 12, 1997. No director may be removed, unless that director also is an employee of the company and his employment has terminated. If such employee is terminated, holders of Class A, voting common stock, "shall have the right to remove such Board Member and to designate a substitute. . . ." *See* Stockholders Agreement at Section 4.02(b). Subsequent boards are selected by the Class A stockholders.

7. The SF Wisconsin board may be expanded to four directors during the first three years, if Savoy so elects. *See* Stockholders Agreement at Section 4.02(a). In the event Fox converts its Class B nonvoting stock to Class A voting stock, which it may do after September 20, 1997, the board will expand to four members, one of which Fox will be entitled to designate. *See* Stockholders Agreement at Section 4.02(c)(ii). Fox can designate two of the four board members if, in addition to converting its stock, it has also exercised its option to acquire half of all common shares.[11] *Id.* at Section 4.02(c)(i).

8. Notwithstanding the nonvoting features of Fox's common stock in SF Wisconsin, Section 4.04 of the Stockholders Agreement endows Fox with the right to approve any "Major Decision." Major decisions are specified as those relating to: entering into any line of business or activities other than the acquisition and operation of WLUK-TV; mergers, consolidations, or sale of all or substantially all of the assets of the company and licensee; the acquisition of another business; the sale or transfer of any securities owned or held by the company; incurrence of debt with respect to acquisition of WLUK-TV; issuance, sale or exchange of stock; making a material tax election; amending the certificate of incorporation or by-laws; and declaring or paying a dividend other than as provided in the Stockholders Agreement.

9. Management of the "business, affairs and operations" of SF Wisconsin's television station, WLUK-TV, is delegated to the company's president, who is to manage "subject to the authority of the Board of Directors." *See* Stockholders Agreement at Section 4.03, as amended on October 31, 1994. Herwitz has been selected to serve as president for a three-year term, ending on March 17, 1997.[12] According to the declaration of Chase Carey, executive vice president and chief operating officer of FTS. it was Carey who "suggested to Savoy that the new entity should employ Mr. Herwitz as its president." *See* Declaration of Chase Carey, attached to Letter from SF Wisconsin, March 8, 1995. Carey adds in his declaration:

> I explained that Mr. Herwitz would be leaving the employment of Fox and recommended that Messrs. Kaufman and Korman meet with him. Following their meeting, Messrs. Kaufman and Korman advised me that they were very impressed with Mr. Herwitz and agreed that the new entity should employ him. I then discussed with them Mr. Herwitz's proposed

[7] The Stockholders Agreement provides that the Fox option may be exercised in whole or in two steps. If exercised under the two-step procedure, Fox would first acquire from Savoy 24% of Savoy's common stock, giving Fox 49% of the SF Wisconsin common stock. Fox, thereafter, could acquire the remaining 1% from Savoy, to give Fox half of the common stock shares.

[8] The SF Wisconsin Stockholders Agreement was executed on October 12, 1994. Fox may exchange its nonvoting stock for voting common stock beginning after September 20, 1997.

[9] In calculating whether the station has increased in value, to be subtracted from the station's performance are bonuses paid out to SF Wisconsin president Thomas Herwitz under the Employment and Compensation Agreement.

[10] The directors and officers of each of the SF Wisconsin subsidiaries, SF Broadcasting of Green Bay, Inc. and the proposed licensee, SF Green Bay, are identical.

[11] Fox will not have the right to select half of the board if it has exercised only the first step of the option, resulting in its holding 49% of all shares of common stock. *See* Stockholders Agreement at Section 4.02(c)(i).

[12] It is unclear whether the Herwitz employment agreement terminates on March 17, 1997, as stated in Section 1 of that agreement, or on a date three years from the date of the acquisition of the first television station by the venture, as is intimated in Section 2, which provides for compensation to Herwitz through that date.

> compensation arrangements. Thereafter, with the concurrence of Messrs. Kaufman and Korman, I presented and negotiated the principal terms of his compensation and employment with Mr. Herwitz.[13]

As a condition to their approval of the hiring of Herwitz, Carey states, Kaufman and Korman "informed" Carey that they must have the sole authority to supervise and, if they ever believed it appropriate, to discharge Herwitz. "I acknowledged and accepted this condition," Carey adds.

10. The only other officers named thus far, according to the application, are Savoy principals Terri Napolitani, who is to serve as secretary, and Howard Bass, who is to serve as treasurer. Additionally, upon the recommendation of Herwitz, according to SF Wisconsin, Kaufman and Korman approved the hiring of William Cunningham, who "[i]t is contemplated . . . will be elected as an officer" of SF Wisconsin once Savoy-Fox venture acquisitions are made. Korman states in his declaration that at the time of the recommendation, Cunningham, who had worked for Herwitz at Fox's WTTG(TV), Washington, D.C., "was still employed by Fox." Cunningham's job, Herwitz states, is to assist Herwitz in the evaluation of potential station acquisitions and in the management of the stations to be acquired.

11. Under Section 4.06(b) of the Stockholders Agreement, SF Wisconsin "shall at all times use its best efforts" to operate WLUK-TV as a Fox network affiliate "in good standing." Upon consummation, this provision states, SF Wisconsin shall cause the proposed licensee to enter into a Fox network affiliation agreement for its WLUK-TV for a 10-year period, commencing upon the termination of that station's current affiliation agreement.

**General allegations of NBC**

12. NBC opposed the SF Wisconsin applications on two grounds, requesting that the Commission dismiss the applications, designate them for evidentiary hearing, or conduct a further inquiry. First, it disputes that Fox should be accorded non-party status, arguing instead that WLUK-TV is attributable to Fox because of its *de facto* control of, or at least its influence over, SF Wisconsin. Adding WLUK-TV to the eight television stations already owned by Fox, as well as to those which Fox seeks to acquire via applications pending before the Commission, would, NBC asserts, place Fox in violation of the 12-station, national ownership cap.[14] *See* 47 C.F.R. §73.3555(e).

13. Second, NBC contends that the alien ownership of SF Wisconsin does not comport with Section 310(b) of the Communications Act, 47 U.S.C. §310(b). NBC points to Fox's representation in an ongoing proceeding that it is 99%-owned, through intervening companies, by The News Corporation Limited, an entity organized under the laws of Australia. Equity ownership in the parent of a licensee, NBC contends, is statutorily limited to 25 percent. Yet here, NBC argues, the combined contributions to SF Wisconsin by Fox and Savoy exceed that limit.

14. With regard to NBC's first contention, we find, for reasons discussed below, that Savoy holds *de jure*, as well as *de facto*, control of SF Wisconsin. We also find at this time, as discussed more fully in paragraph 44 below, that WLUK-TV is not attributable to Fox. However, the Commission recently adopted a Notice of Proposed Rulemaking concerning attribution issues. *Review of the Commission's Regulations Governing Attribution of Broadcast Interests* in MM Docket No. 94-150, FCC 94-324 (*Attribution Review*), released January 12, 1995. The rules emerging from *Attribution Review* will be applied to the facts of this case, and our grant here is conditioned upon the outcome of that rulemaking proceeding. The parties here should be aware that this rulemaking is being conducted in parallel with the proposed increase of broadcast ownership limits. *See Review of the Commission's Regulations Governing Television Broadcasting* in MM Docket No. 91-221 , FCC 94-322, released January 17, 1995.

15. As to the second NBC allegation, we note that Fox's alien ownership structure and basic qualifications are the subject of an ongoing Commission inquiry undertaken in connection with Fox's pending renewal application for WNYW-TV, New York, New York. File No. BRCT-940201KZ. We are unable, at this time, therefore, to conclusively determine whether a joint venture in which Fox is a participant comports with the statutory proscription. We shall, therefore, grant the applications now before us, but we shall condition our action upon the outcome of the alien ownership and other matters at issue in the pending WNYW-TV renewal proceeding.

## CONTROL BY/ATTRIBUTABLE STATUS OF FOX

**Allegations/opposition**

16. NBC urges the Commission to find that WLUK-TV, the station to be acquired by SF Wisconsin, is attributable to Fox on one of two predicates: because Fox wields *de facto* control over that company or because Fox "has such extensive influence" over it. NBC alleges that Fox was the only experienced broadcaster in the two-party venture; that through its then-employee Herwitz, Fox was involved in creating the SF entities; that Fox participated in selecting Herwitz as a director and manager of the SF entities; that Fox assumed substantial risk in the enterprise; that Fox controls in perpetuity the proposed licensees' choice of network affiliation; and that Fox secured the right to take negative control of the business within three years. In determining the attributable status of Fox, NBC maintains that not only must the Commission look to the "separate

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[13] Savoy principal Korman's account of these events, included in his declaration, largely mirrors that of Carey.

[14] Fox has applications before the Commission requesting consent to its acquisition of six television stations: WTXF, Channel 29, Philadelphia (BALCT-940928KF); WFXT, Channel 25, Boston (BALCT-941013KE); KDVR, Channel 31, Denver (BALCT-941130KE); WHBQ, Channel 13, Memphis (BALCT-941222KW); WBRC, Channel 6, Birmingham, Alabama (BTCCT-950406KF); and WGHP, Channel 8, High Point, North Carolina (BTCCT-950406KI). Fox also has on file applications seeking Commission consent to the sale of two of its owned and operated television stations: WATL, Atlanta (BALCT-941214KH); and KDAF, Dallas (BALCT-941201KG). Also on file are the applications of another Savoy-Fox venture, which seek consent to the acquisition of: WVUE(TV), Channel 8, New Orleans (BALCT-941031KK); WALA-TV, Channel 10, Mobile, Alabama (BALCT-941031KJ); and KHON-TV, Channel 2, Honolulu, and two of its satellite television stations, KAII-TV, Wailuku, and KHAW-TV, Hilo (BALCT-941031KF - KI).

impact" of each of Fox's various levels of participation in the venture before us, but it must assess their "cumulative effect."

17. In response, SF Wisconsin contends that Savoy, via its ownership of all of the voting stock and, concomitantly, its contractual control of the board under the Stockholders Agreement, enjoys "absolute" legal control of the company. NBC, SF Wisconsin protests, fails to specifically allege that Fox overrides this control held by Savoy, a "major player" in the entertainment industry which is "fully qualified" to continue to exercise control of the venture with Fox. Moreover, Savoy's substantial contribution and its arrangement of debt financing, SF Wisconsin argues, dispel NBC's contention that Fox is in *de facto* control of SF Wisconsin finances. With its assets and reputation, SF Wisconsin maintains, Savoy could have entered into a broadcast enterprise with any network or group owner, but it selected Fox. In sum, SF Wisconsin concludes, Fox's capital contribution and its affiliation agreement with WLUK-TV are no different from NBC's participation in WKYC-TV, Cleveland, Ohio, activities approved by the Commission in *NBC, Inc.*, 6 FCC Rcd 4882 (1991).

18. Specifically, as to the separate areas of alleged Fox control, NBC cites six areas of concern. SF Wisconsin responds to each.

19. *Involvement of Herwitz.* Herwitz has been in the employ of Fox since 1986, serving as an executive of that company from the time Fox first acquired a broadcast station. And until late 1993, Herwitz was vice president and general manager of Fox's owned and operated station WTTG(TV), Washington, D.C. The preexisting Herwitz-Fox relationship, NBC suggests, motivated Fox to "ensur[e] he [Herwitz] would be in charge of SF's ongoing operations." NBC argues that the "presence and role" of Herwitz at the center of the SF venture "alone indicates pervasive influence and control." In arguing that the Commission must look to the employer-employee relationship, NBC relies on *KKR Associates*, 2 FCC Rcd 7104 (1987). In that case the Commission had before it the proposed assignment of five television stations from Gillett Holdings to Busse Broadcasting, an entity whose nonvoting common stock, representing 99 percent of the equity, was owned by the irrevocable Gillett family trust, whose voting stock was owned by a former Gillett executive, and whose sole officers were former Gillett executives. The Commission approved the transaction, but on the condition, *inter alia*, that there be no direct or indirect communications, oral or written, between the former employer and its former employee, Busse Broadcasting or personnel of that corporation. *Id.* at 7107.

20. SF Wisconsin contends that NBC does not and cannot explain how Herwitz could ignore the direction of the new venture's board, which is controlled by Kaufman and Korman and which may freely discharge Herwitz. Citing the Commission's approval of spin-off transactions and purportedly continuing relationships between the former parent company and the spun-off company in *WWOR-TV, Inc.*, 6 FCC Rcd 193 (1990),[15] and in *Columbia Pictures Industries, Inc.*, 30 FCC 2d 9 (1971),[16] SF Wisconsin argues that to find a nonvoting stockholder in *de facto* control based upon the participation of its former employee "seriously impede[s] the mobility of broadcasting executives."[17]

21. *Formation of SF Wisconsin.* In *Univision Holdings, Inc.*, 7 FCC Rcd 6672 (1992), *reconsideration denied*, 8 FCC Rcd 3931 (1993), NBC argues, the Commission noted that the "circumstances surrounding [the] creation" of newly formed companies are "relevant" to the issue of *de facto* control. Accordingly, NBC urges that we give weight to the relative broadcast experience of Fox and Savoy, especially where the "passive investor," Fox, is an experienced owner of several television stations and a broadcast network. NBC also suggests we inquire into the role assumed by Fox in "bringing the SF venture into existence," in negotiating the elements of control between the parties, in initiating contacts with and negotiating the purchase from the assignor of WLUK-TV, and in arranging the financing and other agreements with banks for consummating the transaction.

22. In making its determination, NBC argues, the Commission should also consider all contractual provisions relating to the Savoy-Fox enterprise and submitted in this proceeding, including those since amended by the parties to that agreement. Two such provisions, according to NBC, "clearly reflect the parties [sic] original intention to give Fox control over key aspects of the operation of WLUK-TV." First, as president, Herwitz originally was to manage the business, affairs and operations of the television station not subject to the authority of the board, as is now the case, but in accord with a management agreement "in a form to be agreed upon by the Stockholders" Savoy and Fox. *See* Stockholders Agreement at Section 4.03.[18] That

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[15] In *WWOR-TV, Inc.*, 6 FCC Rcd 193 (1990), *reconsideration denied*, 6 FCC Rcd 6569 (1991), *aff'd sub nom., Garden State Broadcasting, L.P. v. FCC*, 996 F. 2d 386 (D.C. Cir. 1993), another case involving a spin-off, but this time for purposes of comporting with the statutory limits on alien ownership, the Commission permitted foreign-owned MCA to maintain continuing relationships with the MCA spin-off company, Newco. Those relationships included the hiring of current and former MCA employees as Newco directors, the hiring of former MCA employees to act as Newco employees, and the honoring of existing contracts or entering into new ones for the provision of products and services. *Id.* at 201-03. However, MCA did not seek nonattributable status in Newco.

[16] In *Columbia Pictures Industries, Inc.*, 30 FCC 2d 9, *aff'd sub nom. Iacopi v. FCC*, 451 F.2d 1142 (9th Cir. 1971), the Commission approved the spin-off to CBS shareholders of CBS cable television interests and program distribution operations to newly created Viacom, in order to comply with then recently enacted prohibitions against television network cross ownership of certain media. It did so, even though one-third of the directors on the Viacom board, who were also its principal executive officers, were former CBS employees. But the Commission required that CBS tailor its spin-off proposal such that no major CBS employee or attributable stockholder was allowed to hold an equity stake in Viacom, a precaution administered so as to extinguish "essentially the same problems we found inherent in the existing situation." *Id.* at 16.

[17] *Spanish International Communications Corporation*, 2 FCC Rcd 3962 (MMB 1987), *aff'd*, 3 FCC Rcd 4319 (1988), *aff'd sub nom. Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 74 (D.C. Cir. 1991), is, according to SF Wisconsin, supportive of its own case. There, the Commission rejected petitioners' claims that Hallmark, the assignee of television stations licensed to the affiliate of a foreign network, would be improperly influenced by the former licensee because of Hallmark's intention to retain the foreign network's affiliation and to retain its incumbent station managers.

[18] NBC cites to provisions contained in the operating agreement for SF Wisconsin LLC, an entity originally created by Savoy and Fox as the vehicle for its venture. *See* File Nos.

management agreement, NBC notes, could not be modified "without the consultation and discussion" of such changes with Fox. *Id.* Second, an original term of the Stockholders Agreement gave Fox the right to approve Savoy-designated replacement directors on the SF Wisconsin board in the event Kaufman and Korman terminated their relationship with Savoy as a result of a spin-off to Savoy stockholders of the SF Wisconsin interest. *Id.* at Section 7.03. NBC concludes that these original versions indicate that Fox "was clearly the driving force behind the creation of SF.

23. SF Wisconsin emphasizes that although Savoy has not operated television stations, Savoy chairman and chief executive officer Kaufman and Savoy president and chief operating officer Korman are not neophytes to the television industry. Kaufman and Korman, according to their separate declarations, have accumulated many years of experience in the entertainment and communications fields, including ultimate oversight of the television programming businesses of Merv Griffin Enterprises and Columbia Television. At that time, SF Wisconsin states, Columbia Television was the largest television programming business in the industry.

24. No information is provided as to how Savoy and Fox were brought together to form their enterprise or as to who initiated contacts with Burnham, the assignor of WLUK-TV. But SF Wisconsin states, as supported by a declaration from Howard Bass, senior vice president and chief financial officer of Savoy and treasurer of SF Wisconsin, that Korman and Bass "recently concluded negotiations" with a syndicate of banks led by Chemical Bank to "arrange" a credit facility for funding the acquisition of WLUK-TV.

25. As to since-amended provisions of its Stockholders Agreement, SF Wisconsin asserts that "[c]learly, it is permissible for a party to amend its application or change its structure in order to address concerns raised by the staff, the Commission or other parties, or to simplify or shorten the process of FCC review of the application." Relying on *KKR Associates*, 2 FCC Rcd 7104 (1987), where the Commission approved a transaction after the applicant amended certain terms, SF Wisconsin maintains that the Commission must evaluate the proposal before it, as amended. In this transaction, SF Wisconsin states, Herwitz is now obligated to manage the stations subject to the authority of the board and Fox will have no approval rights with respect to Savoy designees if Kaufman and Korman depart Savoy. Further, Herwitz, Carey and Korman state in their separate declarations that the current SF Wisconsin-Herwitz employment agreement represents the entire understanding between the parties. "There are no other oral or written agreements or understandings governing his employment and compensation," according to Carey's declaration. "Finally," Carey adds, "there are no 'continuing links' or any other understandings of any kind between Fox and Mr. Herwitz, except as disclosed in Mr. Herwitz's declaration of this date which I have reviewed."[19]

26. Selection of SF Wisconsin board of directors and control of its personnel. Important factors in the determination of *de facto* control, NBC claims, citing *Univision Holdings*, 7 FCC Rcd 6672 (1992), are the relationship between the board members and the party invoking nonattributable status, as well as control over key personnel who are to manage the licensee or the licensee's day-to-day activities. Here, NBC concludes, without providing support, that "Fox directly participated" in selecting the initial SF Wisconsin board, one of whose three seats is to be held by former Fox employee Herwitz. Savoy's right to elect the board is "illusory," according to NBC, because the initial board is "locked in" for three years. As to Herwitz's presidency, NBC contends that the Commission must inquire as to any existing Fox-Herwitz contracts, as to Fox's role in the hiring of Herwitz as president, and as to any other current or former Fox employees who have been hired to work for SF Wisconsin.

27. NBC's allegations are speculative, SF Wisconsin maintains. But even if the initial board were chosen by Fox, according to SF Wisconsin, the majority vote required for board action under the Stockholders Agreement reposes control of that board in Savoy, which holds two of the three seats. Savoy-designated directors Kaufman and Korman "regularly exercise" Savoy's authority over SF Wisconsin and its president, according to SF Wisconsin, which states that "Herwitz is in regular and direct contact with them about all aspects of the business." In several instances, SF Wisconsin states, based upon the declaration of Savoy principal Bass, treasurer of the joint venture, Kaufman and Korman "declined to authorize" Herwitz to proceed with station acquisition proposals he has made.

28. Moreover, SF Wisconsin emphasizes that it is Savoy principals Kaufman and Korman who are "locked in" for the initial three-year term, not Herwitz, because under Section 4.02(b) of the Stockholders Agreement only directors who are also employees may be removed. Kaufman and Korman are not employees of SF Wisconsin, but as president, Herwitz is. SF Wisconsin notes that the Savoy-controlled board may terminate him "at any time." And the vacancy created by Herwitz's departure would be filled by the Class A stockholders, that is, Savoy, at least for the first three years.

29. *Control over finances.* As evidence of financial control, NBC points to Fox's payment of an additional $100,000 per share, or $2.5 million, for its common stock, as well as its contribution of $3 million for preferred stock. Fox will not recoup any of the preferred stock investment, NBC contends, unless the stations increase in value by a factor of 15 percent. Thus, $5.5 million of the Fox contribution is "most at risk" in the Savoy-Fox venture and in normal business transactions, NBC argues, the party bearing the most financial risk is entitled to a "higher degree of control and influence" vis-a-vis the other participants. NBC maintains that the Commission, in *Univision Holdings*, looked to the relative contributions of the shareholders to

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BALCT-940811KJ and BALTT-940811KK (dismissed per request of the applicant on October 18, 1994). SF Broadcasting LLC was reconstituted as a corporation for the proceeding now before us. The Stockholders Agreement for the corporation SF Wisconsin, when filed, was nearly identical to the operating agreement of SF Wisconsin LLC, and originally included the allegedly offending provisions. For ease, we cite to the Stockholders Agreement submitted in this proceeding.

[19] In his declaration, Herwitz indicates that he has a vested interest in a 401(k) plan and Fox's pension plan and options to purchase 10,000 shares of common stock and 5,000 shares of preferred stock of News Corp., "all of which options were granted and vested during the term of my employment with Fox and have not been changed since I left the employment of Fox."

determine whether the nominal majority shareholder was actually in control. Here, the Commission must recognize, NBC argues, that the balance of financial risk indicates that Fox will be in *de facto* control of SF Wisconsin.

30. The amount paid in by Fox for its common stock, according to SF Wisconsin, "clearly is irrelevant" to the issue of control. Herwitz, Kaufman and Korman each declare that the interests of the stockholders in SF Wisconsin resulted from "active and intense arm's length negotiations" between Savoy and Fox. During the course of those negotiations, Herwitz states in a declaration, Fox believed that the value of WLUK-TV, once it became a Fox affiliate, would increase more than Savoy believed it would, resulting in Fox's additional investment. "If anything," SF Wisconsin claims, "this agreement on relative share prices serves as evidence of Savoy's strength in relation to Fox." Further, SF Wisconsin notes that of the estimated $41 million required for the acquisition of WLUK-TV, Savoy will contribute nearly $11 million, while Fox contributes $9.125 million. Savoy has also arranged for $21 million in debt financing for the transaction. All expenditures, according to SF Wisconsin, are approved by Savoy, which established and maintains the bank accounts for the venture. In light of Savoy's financial participation, SF concludes, NBC's allegations should be summarily rejected.

31. *Control over programming.* NBC asserts that Fox "totally controlled" the single most important programming decision a station licensee makes: network affiliation. Section 4.06(b) of the Stockholders Agreement, NBC notes, obligates WLUK-TV to enter into a 10-year affiliation with the Fox network. That provision also requires that SF Wisconsin "at all times" use its "best efforts" to operate the station as a Fox affiliate in good standing. Thus, NBC concludes, as a direct participant in creating SF Wisconsin, Fox "participated in dictating" the affiliation decision, one that "totally foreclosed SF's ability to ever exercise any discretion" over network choice.

32. SF Wisconsin disputes NBC's premise that network affiliation is the most important programming decision. Instead, SF Wisconsin cites local news, public affairs and other informational programming as at least equally important. Moreover, SF Wisconsin states that Savoy chose Fox over other networks because it believed the relationship "would serve *Savoy's* best interests and the interests of the local market[ ] which would see significantly more local news as a result of the acquisition[ ]." (Emphasis included.) Further, as support for the its own arrangement, SF Wisconsin points to the Commission-approved NBC relationship with WKYC-TV, Cleveland, in *NBC, Inc.*, 6 FCC Rcd 4882 (1991). In that case, the Commission found that the station was not attributable to NBC even though NBC (1) owned nonvoting stock representing 49 percent of the licensee's equity, (2) held an option to convert that stock to voting stock, (3) enjoyed a veto right over certain extraordinary corporate actions, and (4) entered into a network affiliation with the licensee.

33. *Additional avenues of control.* Citing Fox's future powers under the Stockholders Agreement to increase its ownership to half of all common stock, to convert its nonvoting shares to voting, and to appoint board members, NBC posits that these rights "reflect an intent to secure Fox [sic] continuing control over the station and to secure leverage over management." Under the option, NBC notes, Fox may hold a 49 or 50 percent interest in the number of common shares immediately after closing. In the fall of 1997, NBC adds, three weeks before the expiration of the term of the initial SF Wisconsin board, Fox may convert all of those shares to voting stock, thereby giving Fox "seamless control" over the composition of the board and "continuous leverage" over Herwitz. Fox's future decision-making authority over Herwitz's employment, NBC concludes, "is a powerful means of immediate and ongoing day-to-day control."

34. Commission precedent on future rights "is clear," according to SF Wisconsin, relying on *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984). There the Commission stated that holders of options to buy stock or rights to convert nonvoting interests to voting interests are not attributed unless and until exercised. Moreover, SF Wisconsin asserts that Fox's interest is now and would remain nonattributable under the Commission's rules even if its nonvoting stock were converted into voting Class A stock, so long as Savoy remains the single majority shareholder. Conversion of Fox's interest, SF Wisconsin adds, is, under Section 6.03(a) of the Stockholders Agreement, "subject to receipt of any necessary regulatory approval."

## DISCUSSION

35. In urging that we find that Fox, a nonvoting shareholder, wields *de facto* control of SF Wisconsin, NBC requests, in essence, that we ignore Savoy's *de jure*, or legal, control of that company.[20] Evaluating whether a party is in *de facto*, or actual control, of an applicant is not formulaic, but is fact-intensive, dependent upon the "special circumstances presented." *Stereo Broadcasters, Inc.*, 55 FCC 2d 829, 821 (1975). Such relevant circumstances are those demonstrating the minority shareholder's "power to dominate the management of corporate affairs," *Benjamin L. Dubb*, 16 FCC 274, 289 (1951), including the ability to elect the members of an applicant's board of directors, *Metromedia, Inc.*, 98 FCC 2d 300, 303, *reconsideration denied*, 56 RR 2d 1198 (1984), *appeal dismissed sub nom. California Association of the Physically Handicapped v. FCC*, 778 F.2d 823 (D.C. Cir. 1985), as well as the ability to direct the applicant's finances, personnel and programming, *see, e.g. Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *reconsideration denied*, 50 RR 2d 1346 (1982). When the applicant in question is a newly formed company, as is SF Wisconsin, the circumstances surrounding the formation of that company are also relevant. *Univision Holdings*, 7 FCC Rcd at 6675.

36. Applying these standards, we determine that Savoy holds both *de jure* and *de facto* control of SF Wisconsin. In so concluding, we rely on several factors. Preliminarily, we acknowledge the disparate levels of broadcasting experience of Savoy and Fox. But unlike the nominally active owners in the Commission's line of "pre-formation activities" cases implicitly relied upon in *Univision Holdings*, 7 FCC Rcd at 6675, *e.g., Evergreen Broadcasting Company*, 6 FCC Rcd 5599 (1991); *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990); *Metroplex Communications, Inc.*, 5 FCC Rcd

[20] References to "*de facto* control" are ordinarily made in the context of operating broadcast stations, while "real party in interest" applies to parties to pending applications. The analysis for both, however, is the same. *Univision Holdings*, 7 FCC Rcd at 6675 n.12. For ease of reference, we shall use the term "*de facto* control."

5610 (1999), Savoy is contributing from its own funds approximately 55 percent of SF Wisconsin's total equity[21] and has negotiated for all of the debt financing required to consummate the purchase of WLUK-TV. The extent of Savoy's financial participation does not prompt us to question its *bona fides* as the controlling entity of SF Wisconsin. We also dismiss as speculation NBC's allegation that Fox "prevailed and controlled" the decision to acquire WLUK-TV from Burnham. While it may be that Fox's willingness to contribute an extra $2.5 million for its common stock and $3 million for preferred persuaded Savoy to participate in the purchase, the Fox premium paid into SF Wisconsin does not indicate control of that decision.

37. Augmenting the credibility of Savoy's control of a newly formed broadcasting company is its management, comprising longtime and active players in motion pictures and television programming, Kaufman and Korman, who have, each declares, "competed intensely" in the past with Fox in those areas. Kaufman has served as the president and CEO of Columbia Pictures Entertainment, Inc. and as the founding chairman and CEO of Tri-Star Pictures, Inc., while Korman has served as senior executive vice president and chief operating officer of Columbia Pictures and senior executive vice president of Tri-Star Pictures. The Kaufman-Korman team now heads Savoy, a publicly traded company with $850 million of total capital available. In light of their substantial and acknowledged business experience, we reject NBC's request that we seek further information pertaining to the manner in which Savoy and Fox came to enter into the SF Wisconsin agreement. *See KIST Corp.*, 102 FCC 2d at 291 n.8 (Commission need not examine manner in which parties entered into enterprise where enterprise is "clearly *bona fide*.")[22]

38. Looking to the proposed governance of SF Wisconsin, we are guided largely by documents, as amended,[23] which establish the relationship between the sole voting stockholder, Savoy, and Fox. The business and affairs of SF Wisconsin are managed by or under the direction of the board of directors. *See* SF Wisconsin By-Laws, as amended, at Article III, Section 1. The initial, three-member board is indisputably composed of two Savoy representatives, Kaufman and Korman. Any action taken by the board requires at least two affirmative votes, enabling Savoy to outvote Herwitz and thereby to control the board. *See* Stockholders Agreement at Section 402(e)(v). While the business, affairs and operations of WLUK-TV are entrusted to Herwitz as president, he exercises those duties "subject to the authority of the Board of Directors." *See id.* at amended Section 4.03. Indeed, the board, under the majority control of Savoy, may discharge Herwitz at any time.[24] Herwitz's termination as president, in turn, triggers Savoy's right to also remove him from the board. *See id.* at Section 4.02(b). And the vacancy created thereby will be filled by a director elected by Savoy, as the holder of all Class A voting common stock. That SF Wisconsin has been governed in practice as described on paper is evidenced by the SF Wisconsin representation that "[i]n several instances, when Mr. Herwitz has made station acquisition proposals to them, Messrs. Kaufman and Korman declined to authorize him to proceed." In sum, we find that there is no evidence that the SF Wisconsin board or its personnel will not be under the ultimate control of Savoy.

39. Finally, merely entering into an affiliation agreement with a network which is also an equity partner does not, without more, establish an attributable interest, let alone control. *NBC, Inc.*, 6 FCC Rcd 4882 (1991). While such a relationship may prompt us to scrutinize the level of influence in, and possible control over, the nominally controlling stockholder, we note that the affiliation relationship here does not suggest Fox's ability to control SF Wisconsin. As previously stated, "it can no longer be said that the power of a network television supplier over an affiliate amounts to 'life or death.'" *Seven Hills Television Co.*, 2 FCC Rcd 6867, 6881 (Rev. Bd. 1987). In light of the evidence on the record before us, we find that Savoy is in *de jure* and *de facto* control of SF Wisconsin. As for future conduct, we do not expect that an applicant "will not faithfully carry out its representations or that [an applicant] will be operated or controlled in a manner that differs from the [transaction] under consideration." *News International PLC*, 97 FCC 2d 349, 356 (1984).

40. At a minimum, a finding that Fox is in *de facto* control of SF Wisconsin would mean that WLUK-TV is attributable to Fox.[25] That finding, of course, could potentially affect Fox's compliance with the Commission's multiple ownership rules. As NBC alternatively argues, an interest in an applicant need not rise to the level of control, whether *de facto* or *de jure*, in order to be cognizable for purposes of applying our multiple ownership rules to Fox in this case. In determining which interests are cognizable, the Commission attempts to identify those interests in or relationship to an applicant which confer on its holders a degree of "influence" such that the holders have "a realistic potential to affect the programming decisions of licensees." *Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984), *recon. granted in part*, 58 RR 2d 604 (1985), *further recon. granted in part*, 1 FCC Rcd 802 (1986). Consequently, the Commission defines as attrib-

[21] Of the $20.125 million in equity contributions, it is reported that Savoy is contributing $11 million, constituting 55%, and Fox is contributing $9.125 million, constituting 45%.

[22] As demonstration of Savoy's active and arm's-length participation in the formation of the venture, we do observe that the certificates of incorporation specify as incorporators of SF Wisconsin and each of its subsidiaries persons affiliated with Savoy's corporate attorneys, Fried, Frank, Harris, Shriver & Jacobson. Moreover, Herwitz's employment agreement with SF Wisconsin, according to FTS executive vice president and chief operating officer Chase Carey, was also drafted by Fried, Frank.

[23] It is the amended documents, not the original versions, which will legally govern the relationship of the parties.

[24] That Fox participated in the hiring of Herwitz does not rise to the level of control, because it was the Savoy principals who had the ultimate authority to hire Herwitz. *See David A. Davila*, 5 FCC Rcd 5222, 5226 (MMB 1990), *aff'd* 6 FCC Rcd 2897, 2899 (1991).

[25] Finding a party in control where that party is alien-owned or -controlled also would pose concerns under Section 310(b) of the Act. *See, e.g., Univision Holdings*, 7 FCC Rcd at 6675, *WWOR-TV, Inc.*, 6 FCC Rcd 193, 199-200 (1990), *reconsideration denied*, 6 FCC Rcd 6569 (1991), *aff'd sub nom. Garden State Broadcasting, L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993). As mentioned above and more fully discussed below, the compliance of Fox's alien ownership structure with Section 310(b) of the Act will be addressed in the context of its pending application for renewal of WNYW-TV, New York, New York. File No. BRCT-9940201KZ.

utable those ownership interests of five percent or more voting stock and those positional interests of officer or director. *Id.* at 1006, 1025; *see also*, 47 C.F.R. §73.3555, Note 2.

41. Under our rules of attribution, each of the discrete factors here, considered alone, renders Fox's interest a noncognizable one. First, nonvoting stock is not attributable under our rules.[26] 47 C.F.R. 73.3555, Note 2(f). Even if Fox's 25 percent of the common stock carried voting rights, that interest would not be attributable because Savoy would be the single majority shareholder. *Id.* at Note 2(b). Second, the right to vote on matters involving extraordinary corporate actions does not ordinarily undermine the nonattributable character of otherwise non-cognizable interests, so long as that right is narrowly circumscribed. *E.g., News International PLC*, 97 FCC 2d 349, 354 (1984). Third, a programmer, even a network, such as Fox, is not attributable simply by its acting as program supplier for a company's television station. *See NBC, Inc.*, 6 FCC Rcd 4882, 4883 (1991). Next, a former network employee hired by a new broadcast enterprise does not, without anything more, impart to the network a cognizable interest. *Spanish International Communications Corporation*, 2 FCC Rcd 3962, 3965 (MMB 1987), *aff'd* 3 FCC Rcd 4319 (1988), *aff'd sub nom. Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 74 (D.C. Cir. 1991). Finally, an option to acquire up to half of the shares of common stock and a right to convert nonvoting stock are rights that invoke the attribution rules only at the moment of exercise. 47 C.F.R. 73.3555, Note 2(f).

42. To view each of these factors in isolation, however, would be to undermine the underlying objectives of our attribution rules, that is, recognition of those interests that convey influence or control over an applicant. Indeed, despite the approach in *Attribution*, of ascertaining the cognizable status of a given interest or relationship individually, the Commission has, in adjudicatory proceedings, expressly embraced the conclusion that we must assess the cumulative effect of all relevant factors to determine whether the goals of our multiple ownership rules will be "served or hindered by the structure and relationships presented to us." *KKR Associates*, 2 FCC Rcd at 7107; *see also Univision Holdings*, 7 FCC Rcd at 6677-78. We must, therefore, evaluate as a whole the totality of Fox's myriad interlocking interests in and relationships to SF Wisconsin. Fox is a nonvoting stockholder; Fox will pay in 45 percent of the equity of the applicant; Fox may vote on major company decisions; Fox "agreed" to the slate of directors sitting on the applicant's board for the first three years, including its own former employee Herwitz; Fox recommended to the majority shareholder the hiring of Herwitz as president; Fox negotiated the principal terms of Herwitz's compensation as president; Fox has a current employee, Cunningham, set to assume an executive position with the company upon consummation of the proposed transaction; Fox is under common ownership with the network affiliated with the applicant's proposed television station; and Fox has the right to acquire up to half of the applicant's common stock and to convert that stock into voting class.

43. Notwithstanding SF Wisconsin's contention to the contrary, we believe that the interests and relationships in this case do not squarely fall within any of the cases, such as *NBC, Inc.*, in which the Commission has previously found multiple relationships between a network and its affiliate nonattributable. Moreover, whether and under what circumstances multiple relationships, which taken individually are nonattributable, should be considered attributable in the aggregate, is precisely the question we have posed in the pending rulemaking on attribution, *Attribution Review*. We believe that question is a very difficult one, one that is best answered with the benefit of a full and carefully considered record in the *Attribution Review* proceeding.

44. At the same time, we do not believe it is fair or reasonable, given the time constraints and business expectations implicit in broadcast sale proceedings, to defer our consideration of SF Wisconsin's application. Accordingly, on this record, we will deem Fox's interests in SF Wisconsin to be nonattributable and will grant SF Wisconsin's application.[27] However, we will condition that grant upon the outcome of our rulemaking proceeding in *Attribution Review*. Should we determine in that proceeding that the interests and relationships presented here are cognizable, we will then attribute the interests to Fox. Alternatively, Savoy and Fox could modify their relationships to conform with our decision or could elect to provide a showing as to why these interests should not be attributed to Fox.

## ALIEN OWNERSHIP OF SF WISCONSIN

45. Savoy is approximately 19% percent-owned by aliens, according to an April 3, 1995 amendment to the SF Wisconsin application. Fox's alien ownership structure is currently the subject of an ongoing proceeding. *See* Renewal of license for WNYW-TV, New York, New York, File No. BRCT-940201KZ. Fox has reported to the Commission in that proceeding that the alien equity in FTS comprises the "the indirect approximately 99 percent economic/equity interest of News Corp in THC [the parent company of FTS]." *See* Letter from Fox to Roy Stewart, Chief, Mass Media Bureau, May 23, 1994. With respect to the Savoy-Fox joint venture, Savoy is represented to hold 75% of "the common stock equity" of SF Wisconsin, while Fox holds 25%. Based upon total capital contributions, however, it appears that Savoy holds approximately 55% of the equity and Fox holds 45%.[28] An issue in the pending inquiry into Fox's alien ownership is whether the Commission should consider capital contributions as an appro-

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[26] Treatment of nonvoting equity interests is currently the subject of our pending rulemaking proceeding in *Attribution Review*, FCC 94-324, released January 12, 1995, at ¶ ¶52 -54.

[27] To the extent the issues and record are the same, our conclusions will apply with equal force to the other three pending applications involving the Savoy-Fox venture. *See* Note 14, *supra*. To the extent the issues or record are not the same, our decision here does not establish precedent for those pending applications.

[28] We observe that under Section 4.06(c) of the Stockholders Agreement, SF Wisconsin or any of its "Affiliates," which by definition of the term in Addendum I of the agreement includes Savoy and Fox, may be the primary obligor with respect to any acquisition financing. If either Savoy or Fox borrows funds as the primary obligor and contributes those funds as a capital contribution to SF Wisconsin, the 55%-45% Savoy-Fox equity ownership we now rely upon may be invalid.

priate measure of ownership in evaluating a corporation's compliance with the 25% benchmark of Section 310(b)(4). In view of the pendency of that proceeding, we shall condition grant of the applications here upon the outcome of this issue and other matters raised in the WNYW-TV license renewal proceeding.

## CONCLUSION

46. We find that the applicant is otherwise fully qualified and that a grant of the applications would serve the public interest.

47. Accordingly, IT IS ORDERED that the petition to deny of NBC, Inc. IS DENIED.

48. IT IS FURTHER ORDERED, that the applications for assignment of licenses of WLUK-TV, Green Bay, Wisconsin, and W40AN, Escanaba, Michigan, from BBC License Subsidiary, L.P. to SF Green Bay License Subsidiary, Inc. ARE GRANTED subject to:

1. the resolution of the rulemaking proceeding relating to attribution rules, *Attribution Review*, FCC 94-324, released January 12, 1995; and

2. the outcome of the WNYW-TV license renewal proceeding involving Fox Television Stations, Inc., File No. BRCT-940201KZ.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

April 27, 1995

**SEPARATE STATEMENT**

**OF**

**COMMISSIONER ANDREW C. BARRETT**

**Re: In re Applications of BBC License Subsidiary L.P. and SF Green Bay License Subsidiary, Inc. for Assignment of Licenses of WLUK-TV, Green Bay, Wisconsin and W40AN, Escanaba, Michigan (Memorandum Opinion and Order)**

The Commission has decided to conditionally grant the assignment of licenses of WLUK-TV, Channel 11, Green Bay, Wisconsin, and television translator station W40AN, Escanaba, Michigan to SF Green Bay License Subsidiary, Inc. (SF Green Bay) This decision is based, in large part, on the Commission's determination not to prejudge its current attribution proceeding[1] in which we will consider circumstances, standing alone and in their totality, under which the Commission will deem multiple relationships attributable to a party.

I support today's action because of my concern that the rulemaking proceeding, and not a pending application, is the more appropriate forum for making this significant determination. Indeed, I am troubled about the level of uncertainty that may arise as a result of our action today. However, at this time, I am convinced that it is important to signal the Commission's reluctance to decide the impact of significant issues, such as the treatment of non-equity interests and former employee relationships, prior to its review and careful consider of the record in the pending attribution rulemaking.

Still, I am deeply committed to ensuring the continued development and growth of existing and emerging broadcast players. Though the government has a role in this development, I believe that its role is to create a robust and competitive environment in which these entities can develop more fully and meet their public interest objectives. Therefore, as the Commission continues to consider pending broadcast applications without the benefit of a final determination in the attribution proceeding, I will remain cognizant of and seek to give broadcasters the opportunity to satisfy these objectives.

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[1] See, Review of the Commission's Regulations Governing Attribution of Broadcast Interests, MM Docket No. 94-150, FCC 94-324, released January 12, 1995.

April 27, 1995

# SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

RE: *WLUK-TV, Green Bay, Wisconsin and W40AN, Escanaba, Michigan: Applications for Assignment of License (MM-137-95)*

Fox Television Stations would remain within our current ownership ceilings even if ownership of this station is attributed to Fox. For that reason I support granting this license to SF Green Bay License Subsidiary. I disagree, however, with the treatment of the ownership attribution issue, even though it is expressly conditioned upon the outcome of our Attribution rulemaking proceeding.

This Commission has a long history of attributing ownership where, as here, an aggregation of separately permissible tenets of ownership, taken together, reasonably leads to a conclusion that influence can be exercised over the affairs of the licensee. We now are in the process of amplifying and clarifying the conditions under which the Commission will attribute ownership in our Attribution rulemaking proceeding. The record is open in this proceeding, and I look forward to considering these issues later this year, but this case should have been decided under existing rules and precedent.

The facts presented in this case go significantly beyond those presented in the nearest factual situation in which the Commission has declined to attribute ownership. The issue here is the ability to influence, not control. As today's order explicitly recognizes, the question of what aggregation of relationships creates an attributable interest is very difficult, and best answered with the benefit of a full and carefully considered rulemaking record.

In this case, considering the entire web of relationships, it stretches the imagination to believe that the potential for influence does not exist. Among the salient factors are:

- 45 percent of the cash equity investment in the licensee;
- 25 percent nonvoting stock with an option to increase shares up to 50 percent;
- option (at a later time) to convert nonvoting to voting stock;
- negotiation of the move of a key employee to the licensee as President and member of the three-member board, with broad authority over the station's business affairs and operations and regular involvement with his former employer regarding programming matters;
- the placement of an additional employee in a decision-making capacity at the licensee;
- 10-year contractual affiliation of the station; and
- approval rights over certain major decisions of the licensee.

Any one aspect of these relationships, standing alone, would not result in attribution of ownership under our rules. Surely the existence of all of these together provides a very different picture. In circumstances such as these, the whole is greater than the sum of its parts. And yet, anomalously, we are not finding attribution here, but would do so if the sole relationship were ownership of five percent of the licensee's voting stock!

In our Attribution rulemaking we will be addressing these issues. In the interim, I do not wish to delay processing of license transactions. As a banker, I was involved in numerous broadcast ownership transactions, and I recognize the need for deals to move forward. But I also believe we need to apply an awareness of business realities to the transactions we review.

I am concerned about the step we are taking in this item. I fear it may be prejudicial to the outcome of the Attribution proceeding to expand our existing caselaw by permitting such close ties without attributing ownership. Perhaps more important, I think that it is unfair to all of those broadcasters who are complying with our rules for us to expand them here. A further danger is that some may, erroneously, regard today's decision as an invitation to push the envelope still further.

Pending completion of our Attribution proceeding, I believe that we should stay within the boundaries of our existing rules and precedent. Applying these rules fairly is the best way to ensure the continued existence of strong competitors and diverse voices in our broadcasting community.

**Before the**
**Federal Communications Commission**
**Washington, D. C. 20554**

In the Matter of

TCI Cablevision of San Jose, Inc.
CUID No. CA0213 (San Jose)

TCI Cablevision of Colorado, Inc.
CUID No. CO0006 (Boulder)

TCI of Pennsylvania, Inc.
CUID Nos. PA0142 (Conway), PA0145(Edgeworth), PA0703 (Economy) and PA1212 (Green Tree)

TCI TKR of the Metroplex, Inc.
CUID No. TX0554 (Garland)

TCI Cablevision of Dallas, Inc.
CUID No. TX0762 (Dallas)

Benchmark Filings to Support
Cable Programming Service Prices

## MEMORANDUM OPINION AND ORDER

**Adopted: May 4, 1995 Released: May 11, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. We have found no apparent errors in Operators' calculation of their maximum permitted rates. However, Operators' actual CPS tier prices were above the maximum permitted prices that Operators calculated for the CPS tier. Accordingly, Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operators filed:[12]

> For all of the franchise areas considered in this Order, except for the one designated by CUID No. TX0554, Operators on their amended Forms 393 calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Operators used in justifying their rates, of 1.034.

6. For CUID No. TX0554, we have found no apparent errors in Operator's calculation of its maximum permitted rate. However, Operator's actual CPS tier price was above the maximum permitted price that Operator calculated for the CPS tier. Accordingly, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

accurate data currently available for the date for which Operator filed:[13]

> Operator on its amended Form 393 calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rate, of 1.030.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[14] However, we further determine that for CUID Nos. PA0142, PA0145 and PA0703 the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund in these franchise areas.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B, except for CUID Nos. PA0142, PA0145 and PA0703, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[15] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file reports with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing their plans to implement the refunds within 60 days of Commission approval of the plans.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth

[13] *Id.*

[14] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

in Appendix B (plus franchise fee).[16]

12. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

**FEDERAL COMMUNICATIONS COMMISSION**

Meredith J. Jones
Chief, Cable Services Bureau

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[16] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

## Appendix A

| CUID No. | Date First Complaint Filed with FCC | DateComplaint Served |
|---|---|---|
| CA0213 | 2/24/94 | 2/24/94 |
| CO0006 | 2/2/94 | 1/27/94 |
| PA0142 | 1/21/94 | 1/17/94 |
| PA0145 | 12/28/93 | 12/22/93 |
| PA0703 | 2/7/94 | 1/29/94 |
| PA1212 | 1/19/94 | 1/10/94 |
| TX0554 | 11/18/93 | 11/15/93 |
| TX0762 | 2/4/94 | 1/31/94 |

Appendix B

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| CA0213 | $14.26 | $13.91 |
| CO0006 | $12.08 | $11.53 |
| PA0142 | $11.57 | $11.47 |
| PA0145 | $11.57 | $11.47 |
| PA0703 | $11.57 | $11.47 |
| PA1212 | $12.69 | $12.52 |
| TX0554 | $10.32 | $9.98 |
| TX0762 | $12.14 | $11.95 |

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

Falcon Holding Group, Inc.

CUID No. OR0072 (Lincoln City)
CUID No. AL0116 (Attalla)
CUID No. CA0081 (California City)

Benchmark Filings to Justify Cable Programming Service Rates

## MEMORANDUM OPINION AND ORDER

**Adopted: May 5, 1995 Released: May 11, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices Falcon Holding Group, Inc. ("Operator") was charging for its cable programming service ("CPS") tiers in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*Second Order on Reconsideration*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See* Second Order on Reconsideration, 9 FCC Rcd at 4190, paras. 150-152.

Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are less than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

**FEDERAL COMMUNICATIONS COMMISSION**

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also* Second Order on Reconsideration, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D. C. 20554**

In the Matter of

Warner Cable
CUID No. OH0069 (Lima)

Benchmark Filing to Justify Cable
Programming Service Rate

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 8, 1995 Released: May 12, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Warner Cable ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

**FEDERAL COMMUNICATIONS COMMISSION**

JoAnn Lucanik
Chief, Financial Analysis and
Compliance Division
Cable Services Bureau

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[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

Nortel Cable Associates
CUID No. MN0065 (Bloomington)

Benchmark Filing to Justify Cable Programming Service Rate

## MEMORANDUM OPINION AND ORDER

**Adopted: May 8, 1995 Released: May 12, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Nortel Cable Associates ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. On July 6, 1994, Operator filed a motion to dismiss the complaint. Operator asserts that it did not receive the complaint from the complainant and was not aware of the complaint until it found a copy in the Commission's files. Operator's assertions do not persuade us that the complaint is invalid or should be dismissed. The complainant certified on FCC Form 329 that it mailed a copy to Operator on February 25, 1994. Although Operator asserts that it did not receive a copy of the complaint at that time, under our rules service is complete upon mailing.[11] We will therefore consider February 25, 1994 as the date of service, but we will not consider imposing penalties on Operator for failing to respond to the complaint in a timely manner.

5. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[12]

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

**FEDERAL COMMUNICATIONS COMMISSION**

JoAnn Lucanik
Chief, Financial Analysis and
Compliance Division
Cable Services Bureau

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[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] 47 C.F.R. § 76.956(a).

[12] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

Transmittal Nos. 2952 and 3441

AT&T Communications
Contract Tariff No. 374

## ORDER

**Adopted: May 9, 1995 Released: May 10, 1995**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. On January 11, 1995, AT&T Corp. (AT&T) filed Transmittal No. 2952, which proposes to modify the contract price, volume discount, and availability sections of Contract Tariff 374. On April 26, 1995, AT&T filed Transmittal No. 3441 to revise the changes made in its earlier filed transmittal. Both transmittals are scheduled to take effect on May 11, 1995. For the reasons stated below, the Common Carrier Bureau suspends Transmittals No. 2952 and 3441 and initiates an investigation of these transmittals.

## II. BACKGROUND AND SUMMARY OF PLEADINGS

2. On January 17, 1995, The Furst Group, Inc. (Furst) filed a petition to reject or suspend Transmittal No. 2952.[1] On January 17, 1995, Public Service Enterprises, Inc. (PSE) filed a petition to reject or suspend and investigate Transmittal No. 2952. AT&T replied on January 20, 1995.

3. In its petition, Furst claims that AT&T did not seek its consent, as the existing customer, to the changes in Contract Tariff No. 374 that were proposed in Transmittal No. 2952. Furst complains that the transmittal would adversely affect it by, among other things, increasing the volume thresholds required for discounts on international calls.[2] Furst also alleges that the revisions in the transmittal would alter Contract Tariff 374 so that it will be inconsistent in many other ways with the contract that Furst has with AT&T. These differences are also issues in Furst's pending formal complaint against AT&T, File No. E 94-72, which alleges that AT&T has violated the Communications Act in connection with its provision of Contract Tariff No. 374 services to Furst.

4. PSE contends in its petition that Transmittal No. 2952 would unreasonably restrict the general availability of preferential rates established by Contract Tariff 374 in violation of Section 202 of the Communications Act, 47 C.F.R. § 202, and the policies adopted by the Commission concerning contract tariffs. PSE argues that the provisions terminating rate stability after February 20, 1997 would effectively limit such protection to a maximum of seven and a half months for any new customer for Contract Tariff 374. Since the original customer would receive this rate stability for the full 18 months remaining in its term, PSE asserts, the modifications proposed in Transmittal No. 2952 would result in disparate treatment between the original customer and new customers. PSE argues that this would violate the Section 202 ban on unreasonable discrimination because the tariff would be tailored to the initial customer's date of service, thereby allowing AT&T to revise tariffs to deny subsequent customers the benefits that the

[1] Furst Petition (Tr. 2952).

[2] Furst's Petition (Tr. 2952) at 3. *See also* Transmittal No. 2952, Section 5.B.1., modifying Contract Tariff 374. The Transmittal No. 2952 modifications would increase by 3.3 percent the volume requirements for the customer to qualify for the new increased discounts also proposed in the transmittal.

original customer receives under the contract tariff.[3]

5. AT&T states in its January 20 reply that neither the tariff nor the contract guarantees Furst a veto over any and all tariff changes.[4] AT&T states that the effect of Transmittal No. 2952 is to increase the discount percentage rates to effectively offset increases in the general tariff rates that form the basis for the rates in Contract Tariff 374. It argues that the effect of the increases in the volume thresholds for international services is more than offset by increases in the discounts associated with each of those volume levels. AT&T states that, taken as a whole, the filing restores the effective "bottom line" for Software Defined Network (SDN) and READYLINE services as of the original filing date of the tariff.[5] In response to PSE, AT&T asserts that under Contract Tariff 374, as amended by Transmittal No. 2952, all provisions apply to all customers of the revised contract tariff and that if PSE wanted the same terms that Furst obtained, it could have taken service under this contract tariff during the initial availability window when Furst obtained service.[6] At any rate, AT&T argues, customers are clearly better off under the revisions proposed in Transmittal No. 2952 than they were under Contract Tariff 374 as initially filed.[7]

6. AT&T's Transmittal No. 3441 revises the Transmittal No. 2952 changes to Contract Tariff 374, removing the February 20, 1997 cut-off date for rate stability. This change would thereby allow any customer of Contract Tariff 374 to have rate stability for the last 18 months of its contract term. Furst filed a petition, on May 2, 1995, requesting that the Commission reject or suspend this transmittal. Furst argues that AT&T neither notified Furst of the changes proposed in Transmittal No. 3441, nor obtained its consent to those revisions.[8] Additionally, Furst asserts that the revisions in this transmittal would materially and adversely affect a number of Furst's rights under Contract Tariff 374 and the contract on which that contract tariff was based.[9]

7. On May 5, 1995, AT&T filed a reply to Furst's petition to suspend or reject Transmittal No. 3441. AT&T argues that the Commission repeatedly delayed the effectiveness of the transmittal and -- because of the delay -- suggested additional tariff changes to limit the benefits of the filing to Furst and avoid retroactive ratemaking. AT&T asserts that further delay would be fruitless and that Furst has failed to meet its burden of proof under Section 1.773(b) of the Commission's rules.[10]

## III. DISCUSSION

8. The Common Carrier Bureau has reviewed AT&T Communication's Contract Tariff 374, Transmittal Nos. 2952 and 3441, and the related pleadings. It is a well-established principle that, when a filed tariff rate differs from a rate set in a carrier-customer contract, the tariffed rate is the legal one.[11] Likewise, if a carrier initiates a unilateral rate change altering a contract rate by filing a tariff revision, the new filed rate becomes

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[3] PSE Petition at 5.

[4] AT&T Reply (Tr. 2952) at 2.

[5] *Id.* at 3.

[6] *Id.* at 5.

[7] *Id.* at 6.

[8] Furst Petition (Tr. 3441) at 3.

[9] *Id.* at 2 and 4.

[10] 47 C.F.R. § 1.773(b).

[11] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, FCC 95-2, at para. 23 (February 17, 1995) (*Interexchange Reconsideration Order*) (*citing* American Broadcasting Companies, Inc. v. F.C.C., 643 F.2d 818 (D.C.Cir. 1980)).

the lawful one unless the revised rates are found to be unjust or unreasonable under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), or otherwise unlawful. In the *Interexchange Order*,[12] we cited the *RCA Americom Decisions* as holding that the substantial cause test applies to tariff revisions that alter material terms and conditions of a long-term contract. In the *Interexchange Reconsideration Order*, the Commission stated that it would take into account that the original tariff terms were the product of negotiation and mutual agreement. The Commission also stated its belief that the fact that AT&T and the original customer chose to do business by a contract tariff and not a generic tariff should carry consequences. The Commission then noted that the benefit of contract carriage is that it can facilitate planning by both users and interexchange carriers through greater availability of long-term commitments and price protection. The Commission then stated in the *Interexchange Reconsideration Order* that this benefit would be reduced if AT&T was unilaterally able to alter the terms of their contracts.[13]

9. The *Interexchange Reconsideration Order* also discussed what principles the Commission would apply in determining whether AT&T had substantial cause to alter unilaterally the terms of a contract in a tariff filing. The Commission stated:

> Given the special nature of contract-based tariffs, we believe that commercial contract law principles are highly relevant to an assessment of whether a contract based tariff revision is just and reasonable under the substantial cause test. We are not prepared, however, to say at this time that these principles provide definitive parameters for a substantial cause showing. Instead, we will consider on a case-by-case basis in light of all relevant circumstances whether a substantial cause showing has been made.[14]

10. In the present case, AT&T has filed transmittals that would modify substantially the terms of Contract Tariff 374, a contract tariff that was filed and became effective pursuant to a contractual arrangement between Furst and AT&T. Furst, the original customer under Contract Tariff 374, has consistently objected to the modifications introduced in these transmittals and refused to agree to them, arguing that both transmittals would materially and adversely affect Furst's rights under Contract Tariff 374 and the contract on which that contract tariff was based. We find that the revisions in Transmittals Nos. 2952 and 3441 would modify the rates and terms of Contract Tariff 374. We cannot find, moreover, on the basis of the record before us, that AT&T has demonstrated that these proposed revisions to Contract Tariff 374 are just and reasonable and that AT&T has demonstrated substantial cause to make such unilateral modifications in Contract Tariff 374. We find instead that Transmittal Nos. 2952 and 3441 raise significant questions of lawfulness regarding unilateral modification of a contract tariff that warrant suspension for five months and investigation. We will designate specific issues and establish a pleading cycle for this investigation in a subsequent order.

## IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that AT&T Communications Contract Tariff No. 374, Transmittal Nos. 2952 and 3441 ARE

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[12] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, at 5898 n.155 (1991) (*Interexchange Order*). *citing* RCA Americom Communications, Inc., 84 FCC 2d 353, 358 (1980) (*Investigation Order*); 86 FCC 2d 1197, 1201 (1981) (*Rejection Order*); 2 FCC Rcd 236 (1987) (*Reconsideration Order*) *(RCA Americom Decisions*).

[13] *Interexchange Reconsideration Order* at para. 25.

[14] *Id.* (foonote omitted).

SUSPENDED for five months from the currently scheduled effective date.

12. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 204(a), 205(a), and 403 of the Communications Act, 47 U.S.C. §§ 4(i), 204(a), 205(a), and 403, an investigation IS INSTITUTED into the lawfulness of AT&T Contract Tariff Transmittals 2952 and 3441.

13. IT IS FURTHER ORDERED that AT&T SHALL FILE revisions reflecting this suspension no later than five business days from the date of this order. AT&T shall cite the "DA" number of this order as authority for this filing.

14. IT IS FURTHER ORDERED that the petitions to reject and suspend AT&T Communications Contract Tariff No. 374, Transmittal Nos. 2952 and 3441, filed by The Furst Group, Inc. ARE GRANTED to the extent discussed above and otherwise ARE DENIED.

15. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate Transmittal No. 2952, filed by Public Service Enterprises, Inc., IS GRANTED to the extent discussed above and otherwise IS DENIED.

**FEDERAL COMMUNICATIONS COMMISSION**

Kathleen Levitz
Deputy Chief (Policy), Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GEN Docket No. 90-314

In the Matter of

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| Amendment of the Commission's | RM-7140 |
| Rules to Establish New Personal | RM-7175 |
| Communications Services | RM-7618 |

**FOURTH MEMORANDUM OPINION AND ORDER**

**Adopted: April 19, 1995 Released: May 12, 1995**

By the Commission:

## INTRODUCTION

1. By this action, the Commission affirms its designation of UTAM, Inc., to manage the transition of the 1910-1930 MHz band from the Private Operational Fixed Microwave Service to unlicensed Personal Communication Service (PCS) operations. Further, we hereby accept UTAM's plan for the relocation of fixed microwave operations from this spectrum and the deployment of unlicensed PCS devices. We are requiring UTAM to submit reports at six-month intervals on the progress of the plan's implementation. UTAM's management of the transition of the 1910-1930 Mhz band will help to ensure that new and innovative unlicensed PCS devices, such as wireless PBX equipment, wireless messaging systems, wireless local area networks, and a broad range of data communication products, are made available as rapidly as possible without disrupting fixed microwave service. Access to the unlicensed PCS spectrum will help create jobs and stimulate competition as entrepreneurial companies develop new products that will operate in this spectrum.

## BACKGROUND

2. In the Notice of Proposed Rule Making and Tentative Decision in this proceeding, the Commission proposed to allocate spectrum for use by unlicensed PCS operations.[1] On May 14, 1993, the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (UTAM) filed a proposal to establish a temporary open industry entity that would assume relocation and spectrum management functions for the proposed unlicensed PCS band, pursuant to Section 332(b) of the Communications Act. The Commission requested comment on UTAM's proposal in a Public Notice released May 18, 1993.[2] UTAM subsequently incorporated itself under the name of UTAM, Inc., in the State of Delaware as a not-for-profit corporation.

3. In its Second Report and Order in this proceeding, the Commission allocated spectrum and established service rules for broadband and unlicensed PCS.[3] On June 13, 1994, the Commission adopted a Memorandum Opinion and Order (MO&O) modifying these rules and policies.[4] In these actions, the Commission allocated the frequency band 1910-1930 MHz for unlicensed PCS devices and established administrative and technical rules for their operation.[5] As part of the technical rules, the Commission required unlicensed PCS devices to conform with a "spectrum etiquette" that was developed by industry. The spectrum etiquette is designed to facilitate sharing and minimize interference between unlicensed PCS devices. Under the spectrum etiquette, the 1910-1920 MHz band is designated for asynchronous communications (data) and the 1920-1930 MHz

[1] See Notice of Proposed Rule Making and Tentative Decision, GEN Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992).

[2] See 58 Fed. Reg. 31183 (June 1, 1993).

[3] See Second Report and Order, GEN Docket No. 90-314, 8 FCC Rad 7700 (1993).

[4] See Memorandum Opinion and Order, GEN Docket No. 90-314, 9 FCC Rad 4957 (1994).

[5] See 47 CFR Part 15, Subpart D.

band is designated for use by isochronous (primarily voice) communications.

4. The 1910-1930 MHz band is currently occupied by 383 fixed point-to-point microwave links. In the Second Report and Order, the Commission also designated UTAM as the coordinator for the transition of the unlicensed PCS band from the fixed microwave service to unlicensed PCS, conditioned on UTAM's submission and the Commissions acceptance of: 1) a funding plan that is equitable to all prospective manufacturers of unlicensed devices, and 2) a plan for "band clearing" that will permit the implementation of nomadic devices and, in particular, nomadic data PCS devices, as promptly as possible. The Commission specified that, as a minimum, such a plan should include estimated time tables and priorities for clearing significant portions of both subbands of the unlicensed PCS spectrum. In addition, the Commission assigned UTAM responsibilities for:

- relocating incumbent microwave systems consistent with the requirements established in ET Docket 92-9;[6]
- addressing concerns from fixed microwave systems about interference from unlicensed PCS operations;
- managing the deployment of "coordinatable" unlicensed PCS systems and devices prior to full band clearing;[7] and,
- determining which unlicensed PCS devices and systems are "coordinatable".

The Commission also:

- established equipment authorization criteria for unlicensed PCS requiring that all applicants be participants in UTAM;
- prescribed requirements for unlicensed PCS devices to qualify as coordinatable;
- established requirements to prevent unlicensed PCS devices from being activated before they are coordinated by UTAM and to ensure that such devices are disabled if they are relocated outside the coordinated area; and,
- provided that UTAM will have no further responsibilities and cease operation when the Commission determines that interference to incumbent microwave systems is no longer a concern.

5. On August 1, 1994, UTAM, Inc., submitted its plan for managing the transition of the 1910 - 1930 MHz band to use by unlicensed PCS operations.[8] UTAM indicates that this plan received the unanimous approval of its voting members. UTAM states that the plan affords a sound and expeditious path to deploying all forms of unlicensed PCS devices, while protecting the interests of incumbent microwave licensees.

## SUMMARY OF THE UTAM PLAN

6. The UTAM plan describes UTAM's organization and governance, financing plan, band clearing plan, coordination procedures, protection of proprietary information, dispute resolution

[6] See Third Report and Order in ET Docket 92-9, In the Matter of Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, 8 FCC Rcd 6589 (1993).

[7] A "coordinatable" unlicensed PCS device is defined as a PCS device whose geographical area of operation is sufficiently controlled either by necessity of operation with a fixed infrastructure or by disabling mechanisms to allow adequate coordination of their locations relative to incumbent fixed microwave facilities. See 47 CFR §15.303(b).

[8] See UTAM Plan for Financing and Managing 2 GHz Microwave Relocation.

procedures and UTAM's plans for ending its coordination role and dissolving itself. The various aspects of the plan are summarized in the following paragraphs.

7. In its plan, UTAM states that its membership is open to any entity with a material interest in the manufacture, sale, or distribution of unlicensed PCS products; users of unlicensed PCS products; incumbent microwave licensees; and, entities engaged in the manufacture, planning or installation of microwave systems. Full voting membership is limited to parties that share in the costs of clearing the spectrum. UTAM had 8 full voting members and 30 associate members at the time the plan was submitted.[9] UTAM's business affairs are to be governed by a Board of Trustees elected by the voting members. Complete details on UTAM's membership requirements, organizational structure and decision-making processes are contained in UTAM's By-laws, which are appended to the plan.[10]

8. UTAM's financing plan addresses the expected costs of relocating the incumbent microwave operations as well as the estimated revenues that will be available for this purpose. UTAM assumes that PCS licensees will fund one-half the costs of relocating the 383 microwave links in the unlicensed PCS spectrum because these links are paired with links in the licensed PCS spectrum. UTAM also projects it will need to fully fund the relocation of 10% of the approximately 1420 microwave links in spectrum adjacent to the 1910 - 1930 MHz band in order to avoid adjacent channel interference.[11] UTAM estimates that it will cost an average of $200,000 to relocate each microwave link. Thus, UTAM estimates that it will cost approximately $67 million to fund the relocation of microwave links.[12] UTAM also identifies costs for a variety of other elements such as interference analyses, an equipment location verification procedure, development of an unlicensed PCS deployment data base, a coordination subcontractor, site specific coordinations and administrative costs.

9. UTAM identifies a number of revenue sources. These include membership fees, advances from several UTAM members, clearing fees and special fees from manufacturers that are designated for clearing specific microwave links.[13] Clearing fees will be the primary funding mechanism. The clearing fees will be collected by assessing a fee of $20 for each unlicensed PCS transmitter requiring an FCC identification label. Manufacturers will pay this fee through arrangements with UTAM to purchase the necessary label. UTAM will enforce compliance through contracts with UTAM members and through reliance on the Commission's requirement that all applicants for equipment authorization of unlicensed PCS devices operating in this spectrum must be participating members in UTAM. The $20 fee was derived on the basis of a study by BIS Strategic Decisions of the scale and timing of demand for unlicensed PCS systems and

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[9] UTAM currently has 9 voting members and 16 associate members.

[10] See UTAM plan at 18-23.

[11] The microwave links in the unlicensed PCS spectrum at 1910 - 1930 MHz are typically paired with microwave links in the licensed PCS spectrum at 1850 -1910 MHz or 1930 - 1990 MHz. The paired links are usually either 40 MHz above or below the links in the 1910 - 1930 MHz band. However, there is no specific pairing requirement.

[12] See Utam plan at 29.

[13] See UTAM plan at 34. To be admitted to voting membership, the entity must either pay $10,000 in advance clearing fees or begin paying fees to UTAM in connection with the actual sale of unlicensed PCS devices or systems. An associate nonvoting membership is available to any interested party for an annual fee of $500, which covers administrative costs. Additional funds beyond $10,000 advanced by UTAM members for start-up would also be credited towards clearing fees.

devices. Based on its cost and revenue projections, UTAM estimates that all of the microwave links in the unlicensed PCS band can be relocated in six to twelve years. UTAM notes, however, that a public safety licensee availing itself of its full relocation rights could delay band clearing for up to seven years.[14]

10. UTAM's plan for clearing the unlicensed PCS spectrum consists of three principal elements. The plan first provides for band segment self-financing, under which clearing fees from asynchronous devices will be used to clear the asynchronous segment (1910-1920 MHz) and clearing fees from isochronous devices will be used to clear the isochronous band segment (1920-1930 MHz). Second, UTAM intends to establish priorities for clearing specific geographic areas based upon clearing the largest business population per dollar expended.

11. Finally, to ensure the rapid deployment of nomadic data PCS devices, UTAM has developed what it refers to as a "wedge" approach to clearing the spectrum. Under the "wedge" approach, UTAM will begin the band clearing process by first focusing on the relocation of microwave links at 1920 MHz, the center of the unlicensed PCS band and the dividing line between the isochronous and asynchronous segments, and then moving outward to the edges of the unlicensed allocation. UTAM states that its "wedge" approach will expedite the availability of a block of frequencies for both data and voice nomadic devices even before the entire band can be cleared. UTAM points out, however, that because our rules permit public safety microwave licensees to effectively protect their frequencies from unlicensed PCS deployment for up to seven years, any holdouts among public safety licensees can delay nomadic deployment. UTAM states that it is actively soliciting contributions from interested manufacturers that may be directed toward specific clearing efforts. Such contributions would be credited to manufacturers as advance clearing fees, and could hasten the deployment of nomadic data PCS devices. UTAM suggests that the best way to expedite the early deployment of nomadic devices is to ensure a strong revenue stream for band clearing. UTAM believes its plan achieves this objective.

12. The UTAM plan also provides detailed information on how deployment of unlicensed PCS devices will be coordinated to avoid causing interference to incumbent microwave operations. UTAM intends to designate individual areas, probably coincident with counties, as Zone 1 or Zone 2. In Zone 1 areas, early deployment would be allowed subject to a limit on aggregate power levels from the unlicensed PCS devices in the zone.[15] A detailed coordination study using the guidelines from TIA Bulletin 10-F and its successors will be commissioned to define the Zone 1 areas available for deployment of coordinatable devices after UTAM's plan is approved.[16] UTAM would include a margin of 10 percent in its calculations as a further safeguard against interference. The power of the unlicensed devices in an area would be aggregated

[14] See Second Memorandum Opinion and Order, ET Docket No. 92-9, 9 FCC Rcd 7797 (1994). Public safety microwave systems are entitled to a three-year voluntary negotiation period followed by a two-year mandatory negotiation period. Allowing a year to accomplish the actual relocation, plus an additional year to validate the performance of the new facilities, creates a total time period of seven years by which public safety microwave relocations could delay band clearing.

[15] The aggregate power limit would vary among the Zone 1 areas depending on such factors as the proximity and orientation of microwave links in the vicinity of the zone.

[16] TSB10-F was adopted on May 31, 1994; TIA Telecommunications Systems Bulletin Number 10-F, Interference Criteria for Microwave Systems, May 1994, (TSB10-F). The Commission permits use of the procedures in this bulletin to determine the interference potential from licensed PCS systems to fixed microwave systems.

as they are installed and activated to make sure that the maximum permitted power levels are not exceeded. As the aggregate power limit is approached, UTAM would restrict any further deployment of unlicensed PCS devices in that zone until the affected microwave link is relocated. Zone 2 areas are those in which it would be necessary to coordinate the site of each individual unlicensed PCS system. UTAM terms these "site specific" coordinations. The guidelines in TIA Bulletin 10-F would also be used for "site specific" coordinations.

13. UTAM would ensure that unlicensed PCS devices are properly deployed in the coordinated areas through what it terms a location verification process. UTAM notes that the Commission has provided UTAM with considerable latitude in the method used to verify the location of installed systems. In this regard, the UTAM plan sets forth location verification procedures and a device disablement procedure intended to ensure compliance with Sections 15.307(d) and (e) of the rules.[17] The UTAM location verification and device disablement procedures would ensure that a device is not activated before confirmation is made that its geographic location is in a coordinated area and that the equipment's operation will be disabled if it is relocated to a non-coordinated area.[18] Manufacturers will be permitted to develop their own mechanisms or procedures for location verification. The sufficiency of such mechanisms and procedures will be evaluated in accordance with the device disablement procedures. Further, as part of the equipment authorization process, the Commission's staff will review closely the technical aspects of each unlicensed device, including all technical matters related to the device's ability to comply with the coordination procedures.

14. UTAM states that it intends to resolve disputes arising from contractual agreements with its members through binding arbitration, if initial negotiations fail and the contract so provides, or through the courts. With regard to resolution of potential disputes with incumbent microwave licensees, UTAM expresses its commitment to pursue good faith private negotiations and alternative dispute resolution procedures to the greatest extent possible. UTAM states that it will also use its best efforts to assist parties in addressing interference complaints. Interference disputes that cannot be resolved will be brought to the Commission's attention for appropriate action.

[17] See 47 CFR Section 15.307. Section 15.307(d) provides that: "[a] coordinatable PCS device is required to incorporate means that ensure that it cannot be activated until its location has been coordinated by UTAM, Inc. The application for certification shall contain an explanation of all measures taken to prevent unauthorized operation. This explanation shall include all procedural safeguards, such as the mandatory use of licensed technicians to install the equipment, and a complete description of all technical features controlling activation of the device." Section 15.307(e) provides that: "[a] coordinatable PCS device shall incorporate an automatic mechanism for disabling operation in the event it is moved outside the geographic area where its operation has been coordinated by UTAM, Inc. The application for certification shall contain a full description of the safeguards against unauthorized relocation and must satisfy the Commission that the safeguards cannot be easily defeated."

[18] The UTAM device disablement procedure provides separate tests to ensure disablement of fixed and mobile equipment. Briefly, the tests for the fixed equipment are designed to show that it will cease to operate within one minute unless the location verification process has been successfully completed. Further, after the fixed equipment has been made operational through the location verification process, UTAM requires that the power be disconnected and the equipment must be packed in the shipping cartons for eight hours. The equipment is then retested to ensure that it will not operate unless the location verification process is accomplished again. This process also applies to any radiating elements located more than 8000 meters from fixed equipment that acts as a central control unit. The tests for mobile equipment are designed to ensure that it will cease operation within one minute if the signal from the associated base unit is no longer detected.

UTAM notes that, as part of the coordination and clearing fee process, it will need to receive confidential information on individual companies' sales and customer installations. UTAM plans to take steps to prevent unauthorized disclosure and use of such information.[19] Finally, UTAM states that its coordination role will end and it will be dissolved upon the occurrence of two events: the unlicensed spectrum is cleared or it can be shown that there is little risk of interference to the remaining incumbents; and, the costs of microwave relocation have been fully recovered.[20]

## COMMENTS ON THE UTAM PLAN

15. On August 11, 1994, the Commission released a Public Notice[21] soliciting public comment on the UTAM plan. Nine parties filed comments and six parties filed reply comments. These parties are listed in Appendix A. Most of the parties filing comments on the plan generally support UTAM's efforts and believe its plan is appropriate for managing the relocation of 1910 - 1930 MHz microwave operations and the deployment of unlicensed PCS systems. However, a number of these parties express concerns with regard to certain elements of the plan or argue that the plan needs additional specifications. AT&T Corp. (AT&T) and the North American Telecommunications Association (NATA) fully support the UTAM plan. Incumbent microwave interests, including the American Petroleum Institute (API), the Association of American Railroads (AAR) and the Utilities Communications Council (UTC) raise concerns about the reliability of the funding plan, band clearing priorities and potential interference. Hewlett-Packard raises concerns about aspects of the plan related to band clearing and deployment of equipment. Spectralink argues that the UTAM plan lacks sufficient detail to address the many financial and administrative issues and requests that we accept the plan as a "work in progress" that must be supplemented and re-submitted before UTAM receives the Commission's final approval. Apple Computer (Apple) and the South Florida Water Management District (SFWMD) believe the plan does not comply with the Commission's mandate and should be rejected outright.[22] The specific issues raised by the commenting parties are discussed below.

## DISCUSSION

16. Funding Plan. Several commenting parties express concerns that UTAM has underestimated costs and overestimated revenues. Apple and API argue that UTAM's assumption that PCS licensees will pay a substantial share of band-clearing costs is unlikely to be valid. Apple contends that PCS licenses may not be awarded in some areas and some licensees may delay the need for incumbent relocation through the use of frequency sharing techniques.[23] API argues that it is unlikely that there will be any symmetry between the implementation of licensed and unlicensed PCS systems. According to API, UTAM will be faced initially with the need to bear the full relocation costs in some areas and will have to attempt to obtain reimbursement from the licensed PCS provider at a later time.[24] API is concerned that, if UTAM funds are inadequate, incumbent microwave licensees could be requested to relocate only to have funds evaporate during the negotiation and relocation process. Further, API is concerned that funds may be unavailable to relocate microwave links in areas where UTAM fails to adequately control interference from deployment of unlicensed

[19] See UTAM plan at 68.

[20] See UTAM plan at 72.

[21] See Public Notice, DA 94-873, August 11, 1994.

[22] See Apple comments at 2, reply comments at 2; SFWMD comments at 8.

[23] See Apple comments at 6.

[24] See API comments at 5.

PCS devices.[25] API contends that UTAM should either revise its cost estimates upwards or demonstrate that it has a contingency fund to cover any insufficiency of relocation funds. Additionally, API states that UTAM should be required to demonstrate firm financial commitments from its manufacturer members for startup costs. UTC echoes these concerns.[26]

17. SpectraLink Corporation (SpectraLink) expresses concern that UTAM has overestimated revenues from device deployment because UTAM's market penetration predictions do not adequately consider alternatives to unlicensed PCS devices that could reduce demand.[27] Apple argues that UTAM's plan would fund at least some coordination costs through general administrative funds and that this would constitute a de facto forced subsidy of manufacturers of coordinatable devices by participating manufacturers of nomadic devices.[28] It maintains that, if a potential supplier of nomadic data devices were to contribute funds to UTAM, some of those funds would almost certainly be used to support early deployment of coordinatable isochronous devices without the proceeds from such deployment being used to support band clearing for nomadic asynchronous devices.

18. UTAM responds that its estimates of the costs and revenues associated with the relocation process are conservative. UTAM argues that it is reasonable to assume that PCS licensees will seek to clear spectrum at least as quickly as UTAM in order to begin earning returns on their substantial investments and to satisfy the Commission's build-out requirements. Further, UTAM believes that the licensed PCS community will find it necessary to relocate most of the links in their service areas because the 1640 watts maximum e. i. r. p. for licensed PCS base stations will require a 400 km coordination distance. UTAM also points out that its estimate of an average relocation cost of $200,000 per link well exceeds the Commission's staff estimates of $125,000 - $150,000 per link.[29] It states that funds substantially in excess of those required to complete the relocation process will be available under all the scenarios it has investigated. Thus, UTAM believes that band clearing will not be materially delayed, even if there is a moderate increase in the percentage of links to be cleared by UTAM.[30]

19. In response to API's and UTC's concerns, UTAM states that no microwave link will be asked to relocate until UTAM has the funds to complete the move. Further, UTAM maintains that its procedures are designed to safeguard microwave incumbents against interference, and therefore does not expect that it will need to relocate links prematurely.[31] With regard to Spectralink's concerns, UTAM points out that the BIS study already takes into account the impact of demand that can be met by other means.[32] In response to Apple, UTAM states that donated funds may be designated for clearing any part of the spectrum that the donor chooses and will be credited as an advance against clearing fees.[33] UTAM maintains that its plan provides that such designated funds may be directed to clearing either particular frequencies or particular geographical areas.

20. We find that UTAM's cost and revenue

[25] Ibid.

[26] See UTC Reply Comments at 7.

[27] See Spectralink comments at 5.

[28] See Apple comments at 6.

[29] See UTAM reply comments at 3.

[30] Ibid., note 11.

[31] Ibid., at 7 and 8.

[32] Ibid., at 8.

[33] Ibid. at 19; UTAM Plan at 56.

projections are reasonable. These projections appear to be based on conservative estimates and to allow for situations where a revenue source may develop somewhat slowly. While we recognize that there is always some uncertainty in making such projections, we are convinced that there will eventually be sufficient revenues to totally fund relocation of the microwave incumbents. It seems fair to assume the PCS licensees will bear approximately half the cost of relocating the incumbent microwave links in the 1910 - 1930 MHz band, since these links are paired with links in the licensed PCS spectrum. We agree with UTAM that its estimate of the cost for relocating each link is conservative, which should provide some margin if UTAM is faced with relocating more links than it anticipates. We do not agree with API and UTC's argument that the relocation of links would be disrupted if there are funding shortfalls. We note, in particular, that UTAM will not initiate relocation negotiations until adequate funding is available. Further, we believe that UTAM is taking adequate steps to control interference so as to avoid the need to relocate microwave links prematurely. We also see no need to require UTAM to establish a contingency fund for such situations. We are satisfied that the BIS study provides a reasonable estimate of unlicensed PCS device deployment and takes due account of demand that may be satisfied through other equipment or services. Even if demand for unlicensed PCS devices does not fall within the range predicted by the BIS study, or if licensed PCS penetration lags or negotiations with incumbents take longer than anticipated, the safeguards included in the plan ensure that the only consequence will be that band clearing will simply take longer. With regard to Apple's concerns about equity in the band clearing process, we agree with UTAM that the plan clearly indicates that donated funds may be designated for clearing any part of the spectrum that the donor chooses and will be credited as an advance against the donor's clearing fees. Thus, no company interested in clearing the asynchronous band segment for deployment of nomadic products will be forced to subsidize coordination activities.

21. Band-Clearing Plan. Apple argues that UTAM's plan fails to provide for the prompt deployment of nomadic data PCS devices.[34] Apple contends that the UTAM plan merely pays lip service to the Commission's direction that the plan provide for the deployment of nomadic devices as promptly as possible, and that UTAM's proposal for nomadic device deployment is hazy at best and hopeless at worst. It further maintains that UTAM has failed to consider alternative approaches such as in-band retuning of incumbent links. Apple criticizes the "wedge" and "segment self-financing" clearing approaches as unworkable because they ignore the fact that most microwave links in the unlicensed PCS band are centered either on 1915 or 1925 MHz, not on 1920 MHz, and have wide transmitter and receiver bandwidths.

22. API, AAR and UTC express concern about the possibility that nomadic devices could be deployed prior to complete clearing of the unlicensed PCS band.[35] These parties seek assurance that such deployment will not take place without formal Commission approval after public notice and comment. API and AAR also comment that UTAM should propose a procedure for coordinating multiple-link system negotiations with PCS licensees, rather than relying on multiple negotiations over a multi-year period to relocate individual links of a microwave incumbent with a complex system.[36] Hewlett-Packard Company (HP) notes the absence of any assignment of relative priority to the clearing of coordination zones.[37] HP also suggests that, as microwave links are relocated, UTAM should review the possibilities for upgrading Zone 2 areas to Zone 1.

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[34] See Apple comments at 2.

[35] See API comments at 10; AAR comments at 4; UTC reply comments at 7.

[36] See API comments at 7, AAR comments at 6.

[37] See HP comments at 3.

23. In its reply comments, UTAM maintains that it has thoroughly explored all realistic alternatives for expediting deployment of nomadic devices.[38] UTAM believes that it has devised a workable strategy for achieving that objective within the constraints of funding availability and the five-year negotiation process permitted for public safety microwave licensees. It asserts that its approach will maximize the revenues available for clearing, thus permitting nomadic deployment as promptly as possible. UTAM defends its "wedge" approach, arguing that the "wedge" approach, together with the use of guard bands, may permit some nomadic deployment prior to complete band clearing. In defending "segment self-financing" UTAM points out that the BIS demand study found a relatively equal split in demand for asynchronous and isochronous products. Further, it argues that, through the wedge approach, links relocated under segment self-financing will benefit both band segments because each relocated link will be co-channel to one segment and adjacent-channel to the other.

24. Responding to the concerns of API, AAR, and UTC, UTAM observes that the Commission's rules currently permit deployment of nomadic devices when there is no longer any significant risk of interference.[39] UTAM states, however, that it expects to seek Commission approval of any interim measures it may develop for nomadic deployment, pursuant to whatever procedures the Commission deems appropriate. UTAM also maintains that it is sensitive to the incumbent microwave community's need for coordination with PCS licensees to negotiate system-wide relocations and states that it is willing to negotiate system-wide moves on a voluntary basis where appropriate.[40] UTAM states that HP's concerns about clearing priorities will be addressed by following the principle of directing clearing efforts toward the largest increase in business sales opportunities per relocation dollar expended.[41] In response to HP's suggestion regarding zones, UTAM states that it intends to update its database and change zone status as appropriate to reflect band-clearing progress.

25. We believe that UTAM's band clearing plan is workable and appropriate. While we understand Apple's concerns for the need to make spectrum available for nomadic operations promptly, we also recognize the practical difficulties UTAM faces in clearing the 1910 - 1930 MHz band. We believe that UTAM has devised a workable strategy for expediting nomadic device deployment given the existing constraints, such as the need to fund and negotiate the relocation of the incumbent microwave links, and the fact that incumbent public safety licensees are not required to relocate for five years. While we are sympathetic to Apple's desire for a more rapid deployment scheme for nomadic data devices in this spectrum, none is apparent. While Apple suggests that a solution may lie in retuning of the existing microwave links, it does not provide any details as to how this approach would work. We believe that the only way to make the band fully available to nomadic devices is to completely clear it. The most effective way to do so is to enable non-nomadic devices to be deployed so that the fees from such deployment can be used to complete the band clearing process as rapidly as possible. While we share Apple's doubts regarding the potential of the "wedge" clearing approach to make significant amounts of spectrum available to nomadic devices prior to complete band clearing, this approach appears to be the soundest plan given the constraints. As an alternative for those developers of nomadic devices whose needs could not be accommodated by the UTAM plan, we note that we recently allocated additional spectrum at 2390 - 2400 MHz for unlicensed data PCS devices,

[38] See UTAM reply comments at 16.

[39] Ibid. at 17. See 47 CFR § 15.307(c) - (f).

[40] Ibid., at 7.

[41] Ibid., note 5.

and this spectrum will not require clearing. We believe that the immediate needs of unlicensed nomadic data PCS devices can be accommodated in this spectrum.[42] Operation in the 2390 - 2400 MHz band will not require participation in UTAM and will not be governed by the UTAM plan.

26. With regard to AAR, API and UTC's concerns, we addressed the matter of providing for deployment of nomadic devices prior to complete band clearing in the Memorandum Opinion and Order.[43] We stated therein that when we have determined that spectrum is available, or will soon be available, for deployment of nomadic devices, we will issue a Public Notice announcing the date upon which we will begin accepting and processing applications for certification of such devices. We believe that this plan will adequately ensure that nomadic operations do not cause interference to fixed microwave operations. We believe UTAM's commitment to voluntarily address the concerns of the incumbent microwave community regarding coordination with PCS licensees to negotiate microwave relocations on a system-wide basis where possible and appropriate will further the relocation process. Such system-wide coordination and negotiation activities will promote more rapid availability of spectrum and minimize the relocation burden for incumbent microwave licensees. We believe that it is neither necessary nor practical for the Commission to require such system-wide negotiations. Similarly, we believe that UTAM has adequately responded to HP's concerns about clearing priorities and updating of the zone status.

27. Coordination. AAR, API, SFWMD and UTC express concerns about UTAM's coordination plans for Zone 1 areas. These parties are generally concerned that UTAM will not be able to control deployment of equipment in Zone 1 areas. Accordingly, they state that UTAM's safety margin should be increased from 10 percent to 50 percent to account for devices that may deployed without being coordinated. UTC suggests alternatively that the Commission disallow the "Zone 1" concept and require site-by-site coordination. HP requests that UTAM provide advance notice of, and seek Commission approval for, impending notices to stop deployment in Zone 1 areas where the cumulative power cap is being approached.[44]

28. Several parties express dissatisfaction with UTAM's proposed location verification process (LVP) for ensuring that unlicensed PCS systems are installed only at their coordinated locations. API suggests that UTAM develop a standard LVP for all manufacturers, rather than permitting UTAM approval of procedures developed by individual manufacturers. API argues that this was the Commission's intent.[45] SFWMD goes further in insisting that the Commission intended that the plan specify the technology that manufacturers must incorporate to prevent unauthorized deployment.[46] UTC expresses concern that UTAM has proposed no means to confirm if a manufacturer is following its location verification process.[47] AT&T suggests that manufacturers installing equipment in Zone 1 be required to report exact location of deployment, rather than just the county, to enable more precise determination of potential for interference to individual microwave incumbents and to allow location of sources of interference.[48]

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[42] See First Report and Order and Second Notice of Proposed Rule Making in ET Docket No. 94-32, adopted February 7, 1995, 60 FR 13071 (1995).

[43] See Memorandum Opinion and Order, supra, at para. 218.

[44] See HP comments at 1.

[45] See API comments at 13-14.

[46] See SFWMD comments at 5.

[47] See UTC comments at 5.

[48] See AT&T comments at 4.

29. API maintains that, for Zone 2 deployments, fixed transmitting equipment remotely located from the main fixed unit of a system should be required to be disabled if it is removed from the coordinated location by more than 300-400 meters.[49] Further, API believes that UTAM must be able to demonstrate that mobile units will disable themselves when out of range of the associated base station and be incapable of reactivation until back within range of that facility. SFWMD and UTC argue that UTAM's proposed device disablement procedure will allow mechanisms that are too easily defeated by the user.[50] UTC states that UTAM's proposed disablement tests would permit use of mechanisms that can be easily defeated by simply relocating the device within eight hours or ensuring that the device is not disconnected from a commercial power source for more than eight hours at a time.

30. In its reply, UTAM notes that industry has already accepted its interference analysis methodology and incorporated it into TIA Bulletin 10F.[51] UTAM points out that when a system is deployed in a Zone 1 area, it will be coordinated at the maximum capacity of the installed system (i.e., a wireless PBX system will be coordinated on the basis of the maximum number of wireless telephones it can handle). Since systems are initially operated at less than 50 percent of their installed capacity, UTAM argues that there is already a built-in safety margin. Additionally, UTAM plans to set the permitted aggregated power level 10 percent lower than the interference threshold to account for any deployments in progress. UTAM states that it fully understands the concern about the effect of "stop deployment" orders on manufacturers and is exploring acceptable mechanisms for addressing this issue. UTAM plans to provide timely updates regarding the interference environment facing unlicensed PCS manufacturers.[52]

31. Responding to API and SFWMD regarding the lack of a standard LVP or technology, UTAM points out that the Commission's rules explicitly permit manufacturers to develop their own procedures.[53] It also points out, in response to UTC and AT&T, that it intends to monitor compliance with the LVP and to collect all information necessary to do so.[54] UTAM states that if a manufacturer changes its LVP or disablement measures, the manufacturer will be required to submit the changes for re-evaluation by UTAM and review by the FCC.[55]

32. UTAM maintains that a requirement for demonstrating that a device will be disabled when out of range of its associated coordinated base station has been included in the device disablement procedure appended to the plan.[56] Further, UTAM argues that API has misinterpreted the UTAM disablement criteria for equipment located more than 8000 meters from the associated base station. This limit applies only to Zone 1 deployments; each removable and fixed part of a Zone 2 deployment must be coordinated at its particular location consistent with TIA 14.11 requirements. UTAM maintains, in defending its device disablement procedures, that it is appropriate to require disablement only after the device has been disconnected from electrical power for eight hours. UTAM states that this procedure was developed as the result of extensive discussions with the

[49] See API comments at 16.

[50] See SFWMD comments at 6; UTC comments at 7.

[51] See UTAM reply comments at 10-11.

[52] Ibid., note 5.

[53] Ibid., at 13.

[54] Ibid., at 11-12.

[55] Ibid., at 14.

[56] Ibid., at 14.

microwave industry, and chosen so that large numbers of unlicensed PCS systems would not need to be reinitialized in the event of a short-duration power outage.[57]

33. We believe that UTAM has adequately responded to the concerns that have been raised. Its explanation that appropriate adjustments have already been incorporated into the TIA Bulletin 10F criteria and stated intention to coordinate systems deployed in Zone 1 areas at maximum system capacity appear to adequately address the concerns of the microwave community. We also note that UTAM is taking steps to respond to the concerns of HP and other manufacturers regarding the necessity for advance warning for "stop deployment" orders. We are similarly convinced that UTAM will be gathering sufficient information to monitor manufacturer compliance with its LVP and to expeditiously locate any source of interference, should it occur. We disagree with API and SFWMD that we intended that UTAM develop and specify a standard procedure or specific technology to prevent unauthorized deployment of unlicensed PCS devices. In fact, we previously stated that we would allow UTAM broad flexibility in establishing the means it uses to fulfill its responsibility for ensuring that unlicensed devices do not interfere with existing microwave operations.[58] We continue to believe that this is the appropriate approach. We believe that the standards for disablement mechanisms outlined in the plan, with the clarifications provided by UTAM in its response to the comments, will adequately protect incumbent microwave operations from potential interference caused by unauthorized relocation of unlicensed devices. We also agree with UTAM that further requirements would not prevent those who wish to intentionally violate the rules from doing so.

34. Enforcement and Dispute Resolution. AT&T suggests that UTAM report all violations of its procedures to the Commission and that the Commission make clear in its rules that noncompliance with UTAM requirements violates Section 302 of the Communications Act and subjects the violator to forfeitures and other penalties.[59] API and AAR request clarification of UTAM's dispute resolution procedures.[60] API states that the UTAM plan provides little specific information about how UTAM will resolve interference complaints. It requests that UTAM propose a specific interference resolution procedure and provide a process, including point of contact, time frames for resolution and other information necessary for incumbent licensees to properly evaluate and comment upon the interference resolution methods to be employed by UTAM. API states that, because of timing difficulties, use of alternative dispute resolution processes could create situations in which incumbent licensees who have legitimate migration disputes could be required to make large scale system changes on an expedited time frame and under tremendous pressure. API seeks assurances that specific dispute resolution methods and extended timetables, where necessary, will be available. AAR states that, at the very least, UTAM's dispute resolution process ought to include access by fixed microwave incumbents to the UTAM database of unlicensed PCS deployments.

35. UTAM states in its reply that it agrees with AT&T and will report all violations of which it becomes aware to the Commission.[61] UTAM also clarifies its dispute resolution procedures by assuring that it will work with affected parties to deal with interference problems, including resorting to measures such as emissions adjustments and filters. In dealing with cases of suspected

[57] Ibid., at 15.

[58] See Memorandum Opinion and Order, at para. 220.

[59] See AT&T comments at 5.

[60] See API comments at 18; AAR comments at 8.

[61] See UTAM reply comments at 12.

interference, UTAM states that it will make available to affected microwave licensees as much information about unlicensed PCS deployments as possible, consistent with the need to protect the confidentiality of information supplied by manufacturers.

36. We believe that the requirements of Section 15.307(b) of the Commission's rules are adequate to ensure manufacturers' compliance with the procedures established by UTAM, and that no additional rules are necessary or desirable.[62] We fully intend to take appropriate enforcement action against parties that violate the rules and procedures we have established with regard to operation in the unlicensed spectrum at 1910-1930 MHz. We further believe that the clarifications UTAM provides regarding its dispute resolution procedures in its response to API and AAR remove any confusion over UTAM's intent to work in good faith to resolve any disputes that may arise.

37. Overall Adequacy of Plan and Designation of Coordinator. AT&T, NATA and UTAM fully support the plan and urge that we accept it immediately as submitted.[63] API, AAR, SpectraLink, and UTC, generally support UTAM's efforts in developing the plan, but do not feel that the plan should be accepted until the it is amended to address the issues discussed above.[64] SpectraLink is concerned that UTAM's funding predictions are overly optimistic and requests that we identify an alternative entity to be responsible for coordination should UTAM cease operation.[65] Apple states that, in view of the deficiencies it sees in UTAM's plan, the Commission should reject the plan. Apple argues that we should either revoke UTAM's conditional authorization as the designated coordinator for the unlicensed PCS band, or alternatively, limit UTAM's authority to managing the transition of only the isochronous portion of the band.[66] Apple also raises concerns with regard to UTAM's governance, particularly with regard to the strong authority given to the Board of Trustees. SFWMD requests that we reject UTAM's plan because it does not adequately protect incumbent microwave interests. In its reply comments, UTAM maintains that the level of detail in the plan is more than sufficient for the Commission to issue an informed decision on its merits.[67]

38. We find that UTAM has provided adequate and sufficient information to satisfy the conditions laid out in the Second Report and Order. As explained above, we believe that UTAM has adequately addressed all of the relevant issues. We find no merit in Apple's arguments that UTAM's authorization should be revoked or limited. While Apple challenges UTAM's governance, it offers no specifics as to how the governance procedures should be changed or otherwise improved. Further, we disagree with SpectraLink that it is necessary or desirable to identify an alternative entity at this time to manage the band transition should UTAM cease operation. We note that no alternative to UTAM has been suggested or come forward. Therefore, we are reaffirming UTAM as the coordinator for the transition of the 1910 - 1930 MHz band from fixed microwave services to use by unlicensed PCS.

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[62] Section 15.307(b) states: "... In the event a grantee fails to fulfill the obligations attendant to participation in UTAM, Inc., the Commission may invoke administrative sanctions as necessary to preclude continued marketing and installation of devices covered by the grant of certification, including but not limited to revoking certification."

[63] See AT&T comments at 1; NATA comments at 4; UTAM reply comments at 3.

[64] See API comments at 18, reply comments at 7; AAR comments at 8, reply comments at 5; SpectraLink comments at 1; UTC comments at 9, reply comments at 10.

[65] See SpectraLink comments at 4.

[66] See Apple reply comments at 6.

[67] See UTAM reply comments at note 4.

39. We do not believe it is necessary to require UTAM to submit a revised plan that includes the additional information presented in its reply comments. We recognize that, to some extent, the plan and details of its implementation are a work in progress. Accordingly, we believe the appropriate course of action is to monitor UTAM's implementation of the plan. We are requiring UTAM to furnish biannual reports on its progress in implementing the plan. The first report will be due July 1, 1995, and every six months thereafter. The reports should provide an update on the status of the financial and band clearing plans, the extent of incumbent microwave relocation, and the extent of unlicensed PCS device deployment. Additionally, the reports should provide updated projections of future band clearing and unlicensed PCS implementation based on the best and most current data available at the time the report is prepared. We also are requiring that the report provide information on any problems or difficulties encountered in implementing the plan and how they are being resolved.

## ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r), that UTAM, Inc. is designated to coordinate and manage the transition of the 1910 -1930 MHz band from the Private Operational Fixed Microwave Service to unlicensed PCS operations. IT IS FURTHER ORDERED, that UTAM, Inc., shall submit to the Commission reports on its progress in implementing its plan beginning on July 1, 1995, and every six months thereafter. IT IS FURTHER ORDERED, that Part 15 is amended as shown in Appendix B to remove the conditions attached to UTAM's designation as the coordinator for unlicensed PCS operations in the 1910 -1930 MHz band.

**FEDERAL COMMUNICATIONS COMMISSION**

William F. Caton,
Acting Secretary

## APPENDIX A

### List of Commenting Parties

**Comments:**

American Petroleum Institute
Apple Computer
Association of American Railroads
AT&T Corporation
Hewlett-Packard Company
North American Telephone Association
South Florida Water Management District
SpectraLink Corporation
Utilities Telecommunications Council

**Reply Comments:**

American Petroleum Institute
Apple Computer
Association of American Railroads
SpectraLink Corporation
UTAM, Inc.
Utilities Telecommunications Council

## APPENDIX B

Part 15 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

**PART 15 -- RADIO FREQUENCY DEVICES**

1. The authority citation continues to read as follows:

**AUTHORITY: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. sections 154, 302, 303, 304, and 307.**

1. Section 15.307 is revised to read as follows:

**§ 15.307 Coordination with fixed microwave service.**

(a) UTAM, Inc., is designated to coordinate and manage the transition of the 1910 - 1930 MHz band from Private Operational- Fixed Microwave Service (OFS) operating under Part 94 of this Chapter to unlicensed PCS operations.

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FCC 94-271

Before the
# Federal Communications Commission
Washington, D.C. 20554

| | | |
|---|---|---|
| In the matter of | ) | |
| | ) | |
| Amendment of Part 90 of the | ) | PR Docket No. 93-144 |
| Commission's Rules to Facilitate | ) | RM-8117, RM-8030 |
| Future Development of SMR Systems | ) | RM-8029 |
| in the 800 MHz Frequency Band | ) | |
| and | | |
| Implementation of Section 309(j) | ) | |
| of the Communications Act - | ) | PP Docket No. 93-253 |
| Competitive Bidding | ) | |
| 800 MHz SMR | ) | |

## FURTHER NOTICE OF PROPOSED RULE MAKING

**Adopted:** October 20, 1994 **Released:** November 4, 1994

**Comment Date: December 5, 1994**
**Reply Comment Date: December 20, 1994**

By the Commission: Commissioner Quello issuing a separate statement.

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APPENDICES

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## I. INTRODUCTION

1. In this Further Notice of Proposed Rule Making, we propose to implement a new framework for licensing of Specialized Mobile Radio (SMR) systems in the 800 MHz band. We propose new rules for assignment of blocks of SMR spectrum in defined market-based service areas that will facilitate the development of wide-area, multi-channel SMR systems that are comparable to and compete with cellular and broadband Personal Communications Services (PCS) systems. We also propose to designate a portion of the 800 MHz SMR band allocation for continued licensing on a local, station-by-station basis to accommodate the needs of smaller SMR systems that primarily seek to provide local service. The Further Notice addresses how existing SMR systems will be treated under this new regulatory framework, particularly in instances where they are operating on channels that will become part of the spectrum blocks to be licensed on a wide-area basis. We also propose new application and licensing procedures for both the wide-area SMR spectrum blocks and locally licensed SMR channels, including competitive bidding procedures for resolution of mutually exclusive applications. Finally, we seek comment on whether we should continue to license SMR systems on 800 MHz General Category channels or on other non-SMR channels through inter-category sharing.

2. Our primary goal in this proceeding is to establish a flexible regulatory scheme for the 800 MHz SMR service that will allow for more efficient licensing, eliminate unnecessary regulatory burdens on both existing and future licensees, and thereby enhance the competitive potential of SMR services in the mobile services marketplace. At the same time, we wish to ensure that we grant licenses to those who value the spectrum most highly and will maximize its use to provide the best quality and variety of service to consumers. The proposals in this Further Notice are intended to build upon and refine our previous efforts to promote the development of wide-area SMR service in the 800 MHz band, particularly our 1993 *Notice of Proposed Rule Making* that initiated this docket.[1] These proposals are also part of our continuing implementation of the new regulatory framework for mobile radio services enacted by Congress in the Omnibus Budget Reconciliation Act of 1993.[2] Thus, the proposed rules for the 800 MHz SMR service are a direct outgrowth of our recently adopted *Third Report and Order* in GN Docket No. 93-252,[3] in which we concluded that our SMR rules should be,

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[1]Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Notice of Proposed Rule Making*, 8 FCC Rcd 3950 (1993) (*Notice*).

[2]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993) (Budget Act).

[3]*See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, FCC 94-212, adopted August 9, 1994, released September 23, 1994 (*CMRS Third Report and Order*). As a result of a Congressional mandate, we initiated another proceeding which examined and revised our rules pertaining to Part 90 services generally, including the 800 MHz SMR service. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory

to the fullest extent possible, comparable to our rules governing competing commercial mobile radio service (CMRS) providers. Our overriding goal in the CMRS proceeding has been to achieve regulations that maximize competition among CMRS providers and eliminate regulatory distortions in the mobile services market. The SMR industry presents certain unique issues because of the already-existing diversity of SMR services and the competitors providing them. As detailed below, our proposals attempt to strike a fair and equitable balance between the competing interests of local and wide-area SMRs operating in the 800 MHz band. We believe it will facilitate competitors' deployment and operation of SMR systems by eliminating regulations that permit "warehousing" of spectrum, and establishing a licensing scheme that is expeditious and furthers the congressionally-mandated goal of regulatory symmetry between SMR, cellular and broadband PCS.

## II. BACKGROUND

### A. Evolution of the SMR Service

3. The Commission established the SMR service in 1974 as a private land mobile radio service in the 800 MHz band, envisioning that SMR systems would primarily provide radio dispatch communications to eligible customers within local areas.[4] The Commission allocated a total of 14 MHz of spectrum in the 800 MHz band exclusively to SMR systems. This spectrum is divided into 280 channels, 200 of which are contained in a contiguous 10 MHz block, while the remaining 80 channels are divided into 8 blocks with other private land mobile services (e.g., Public Safety, Industrial/Land Transportation and Business) assigned to the intervening channels.[5] In 1990, the Commission allocated 150 additional 800 MHz channels to the General Category, which are available for licensing to SMR providers as well

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Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411 (1994) (*CMRS Second Report and Order*). In the context of that proceeding we requested additional comment regarding wide-area licensing in the 800 MHz band. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Further Notice of Proposed Rule Making*, 9 FCC Rcd 2863, ¶¶ 29-34, 64-66 (1994) (*CMRS Further Notice*). Because the proposals presented in this Further Notice are an outgrowth of and influenced by both the previous record in this proceeding and our findings and conclusions in the CMRS proceeding, we, therefore, incorporate the relevant portions of the record from the CMRS docket into this proceeding.

[4] *See* An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz and Amendment of Parts 2, 18, 21, 73, 74, 89, 91 and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806-960 MHz, Docket No. 18262, *Memorandum Opinion and Order*, 51 F.C.C.2d945, ¶¶ 43, 67 (1975), *aff'd* NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied* 425 U.S. 992 (1976); Amendment of Part 90 of the Commission's Rules to Release Spectrum in the 806-821/851-866 MHz bands and to Adopt Rules and Regulations Which Govern Their Use, PR Docket No. 79-191, *Second Report and Order*, 90 F.C.C.2d1281, ¶ 12 (1982), *recon. Memorandum Opinion and Order*, 95 F.C.C.2d477 (1983); D. Fertig (FCC, PR, Policy and Planning Branch), *Specialized Mobile Radio*, Appendix (Mar. 1991).

[5] A "channel" in this service consists of 50 kHz of spectrum. As discussed in Section IV(A)(4) *infra*, not all of the 14 MHz of spectrum is available in the Canadian and Mexican border areas.

as to all other Part 90 services.[6] Licensees on the 280 SMR-only channels are assigned either one or five channels at a time on a station-by-station basis, and the geographic distribution of stations is defined by the location, antenna height, and transmitter power of each base station in the licensees' systems.[7]

4. Since 1974, the SMR service has experienced rapid growth and diversification.[8] As of May, 1994, our data base indicates a total of 33,000 SMR authorizations with 20,000 trunked stations and 13,000 conventional stations, with virtually all channels in major markets either in use or under construction. Although the service consisted primarily of dispatch providers early on, in recent years SMR service has evolved into a diverse industry comprised of systems utilizing advanced technologies to provide an array of services. The types of SMR service offerings currently available range from traditional radio dispatch service for local customers to more sophisticated voice and data transmissions for customers over vast geographic areas.

5. Although the 800 MHz SMR service rules were designed to require licensing on a station-by-station, channel-by-channel basis, SMR licensees have increasingly expressed an interest in accumulating large numbers of channels and using advanced technologies to increase spectrum re-use and serve wide areas efficiently. In many instances, licensees seek to convert existing analog systems utilizing a small number of high-power stations to digital systems that cover the same area with numerous low-power stations. Initially, we attempted to respond to this demand through waivers[9] and modification of our construction and loading

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[6] *See* Trunking in the Private Land Mobile Radio Services for More Effective and Efficient Use of the Spectrum, PR Docket No. 87-213, *Report and Order*, 5 FCC Rcd 4016 (1990).

[7] 47 CFR § 90.621(c); Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating Above 800 Mhz, PR Docket No. 93-60, *Report and Order*, 8 FCC Rcd 7293 (1993) (*Co-Channel Protection Report and Order*).

[8] For example, according to a 1986 survey conducted by Radio Communications Report (RCR), the largest SMR provider serviced 3,300 mobiles. By contrast, RCR's 1994 survey, indicates that the largest SMR provider serviced 300,000 mobiles. Moreover, in 1994, at least 16 SMR companies serviced more than 3,300 mobiles (the maximum service amount only fourteen years ago). *Compare* Radio Communications Report 5 (January 15, 1986) *with* Radio Communications Report 14 (February 14, 1994) (RCR's Surveys of Top SMR Operators). It has been projected that by the year 2000 SMR services will reach 4.2 million customers. *See* Cellular Telecommunications Industry Association, *The Changing Wireless Marketplace*, 8 (Dec. 17, 1992). In fact, in 1986, such growth prompted the Commission to allocate additional spectrum in the 900 MHz band to the SMR service. *See* Amendment of Parts 2, 15 and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, GN Docket No. 84-1233, *Report and Order*, 2 FCC Rcd 1825, ¶¶ 27-44 (1986).

[9] *See e.g.*, Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 1533, *recon. dismissed*, 6 FCC Rcd 6989 (1991); Letter from Ralph A. Haller, Chief, Private Radio Bureau to David Weisman, DA 92-1734, 8 FCC Rcd 143 (1993) (*Weisman Letter*).

requirements.[10] In our 1991 *Fleet Call* decision, we waived our rule requiring SMR licensees to construct their systems in one year so that Fleet Call could develop an SMR system that would offer wide-area digital voice and data service.[11] In 1993, we adopted rules allowing SMR applicants to request up to five years to construct complex, coordinated, or integrated wide-area systems as defined by § 90.629 of our Rules.[12] We also have permitted applicants for wide-area systems to aggregate their mobiles to satisfy loading requirements and thereby obtain additional channels.[13] Notwithstanding these efforts to accommodate the development of wide-area systems, however, our rules required (and still require) each SMR base station and channel to be individually licensed, regardless of whether it is part of a wide-area, multi-channel system.

6. In 1992, we received petitions for rule making filed by NABER, A & B Electronics, and AMTA proposing revisions to our SMR rules aimed at facilitating the development of wide-area SMR systems. On May 13, 1993, we adopted the *Notice*, which proposed to establish a new framework for wide-area licensing. Specifically, we proposed to streamline site-by-site, channel-by-channel licensing procedures so that licensees would be able to acquire blocks of up to 42 channels within a Commission-defined service area (based on either Major Trading Areas (MTAs) or Basic Trading Areas (BTAs))[14] under a single "Expanded Mobile Service Provider" (EMSP) license.[15] This license would authorize the licensee to use any available channel covered by the authorization, and to locate individual base stations at any available site within the service area based on self-coordination. In the event that mutually exclusive applications remained, we proposed to resolve them through lottery, or through competitive bidding if the Commission received authority to use auctions for this purpose.[16] We further proposed that licensees be required to cover 80 percent of their

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[10]*See* Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, PR Docket No. 92-210, *Report and Order*, 8 FCC Rcd 3975 (1993) (*Extended Implementation Report and Order*).

[11]Fleet Call, Inc., *Memorandum Opinion and Order*, *supra* note 9, ¶ 36.

[12]*Extended Implementation Report and Order*, *supra* note 10, ¶ 6.

[13]*Weisman Letter*, *supra* note 9, 8 FCC Rcd at 144.

[14]Rand McNally & Company, Inc. (Rand McNally) organizes the 50 states and the District of Columbia into 47 MTAs and 487 BTAs based upon economic activity. *See* Rand McNally, *Commercial Atlas and Marketing Guide*, 38-39 (1992).

[15]*Notice*, *supra* note 1, ¶ 7. Because today's proposal differs significantly from that initially described in the *Notice*, we will not refer to SMR systems to be licensed on a wide-area basis under our revised proposal as EMSPs. Instead, because we propose to use MTAs as the basis for wide-area licensing, we will refer to such systems as "MTA-based" systems or "MTA licensees." Existing SMR licensees who have previously received extended implementation authority to construct wide-area systems will be referred to generally as "wide-area" licensees.

[16]*Id.*

service area within five years rather than being subject to a channel loading requirement.[17] In addition, we proposed that EMSP licensees provide interference protection to all co-channel incumbent licensees operating within their service area.[18] Commenters expressed broad support for establishment of a wide-area licensing approach in the 800 MHz band.[19]

## B. Recent Legislative and Regulatory Developments

7. On August 10, 1993, shortly after the *Notice*'s reply comment date, Congress enacted the Budget Act in which it amended Section 332 of the Communications Act of 1934[20] to create two statutorily-defined categories of mobile service: CMRS and private mobile radio services (PMRS). Congress further directed the Commission to implement these classifications in its regulations and to provide for comparable regulation of substantially similar CMRS services. Pursuant to this congressional mandate, we initiated our CMRS proceeding in GN Docket 93-252 and adopted the *CMRS Second Report and Order* on February 3, 1994. In the *CMRS Second Report and Order*, we noted that one of the factors that led Congress to revise Section 332 was its view that SMR providers seeking to compete with cellular and PCS by providing wide-area, multi-channel service should be reclassified as CMRS.[21] We concluded that all SMR systems providing interconnected service would be reclassified as CMRS, while those not providing such service would be classified as PMRS.[22]

8. On April 20, 1994, we adopted the *CMRS Further Notice*, in which we proposed revisions to our technical, operational, and licensing rules and procedures for reclassified CMRS services to conform to the Budget Act's CMRS regulatory paradigm. In the *CMRS Further Notice*, we requested specific comment on certain aspects of the 800 MHz SMR service, including channel assignment policy, definition of service area, construction period, and coverage requirements for wide-area systems.[23] We also observed that the proposal for wide-area licensing made in our 1993 *Notice* might require revision in light of the intervening

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[17] *Id.*

[18] *Id.*

[19] *See e.g.*, Comments of AMTA at 1; Comments of Nextel (formerly Fleet Call, Inc.) at 10, n.20; Comments of Dial Page at 1; Comments of SBC at 1-2; Comments of PacTel Paging at 3-4, nn. 5, 7; Reply Comments of Questar at 2; Reply Comments of Advanced MobileComm, Inc. at 2-3; Comments of NABER at 2-3, 5-6; Comments of PowerSpectrum, Inc. at 4-7; Reply Comments of Mitchell E. Shipman at 2-4; Reply Comments of The Southern Company at 2-3; Comments of E.F. Johnson Company at 3-4. *See* Appendix C for a list of pleadings in PR Docket No. 93-144 and the acronyms used to cite commenters.

[20] Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713 (Communications Act).

[21] *CMRS Second Report and Order, supra* note 3, at ¶¶ 7, 11.

[22] *Id.*, ¶ 11.

[23] *CMRS Further Notice, supra* note 3, ¶¶ 29-34, 64-66.

statutory changes enacted in the Budget Act and the heavy volume of licensing activity in the 800 MHz band that had occurred since the *Notice* was adopted.[24]

9. On August 9, 1994, we adopted our *CMRS Third Report and Order*. In the *CMRS Third Report and Order*, we concluded that 800 MHz SMR licensees either compete or have the potential to compete with other existing and planned wide-area CMRS providers, such as cellular and broadband PCS licensees.[25] Based on this finding, we determined that the technical and operational requirements for the 800 MHz SMR service should be made comparable, to the extent feasible, to those applicable to other CMRS providers. Specifically, we noted that our PCS and cellular rules provide significantly greater flexibility than our current SMR rules, in that they (1) authorize use of spectrum over Commission-defined service areas, (2) assign contiguous spectrum blocks to a single licensee on an exclusive basis, (3) use construction and coverage requirements rather than channel loading requirements to ensure efficient use of the spectrum, and (4) afford maximum flexibility to locate, design, construct, and modify facilities within one's licensing area, so long as no interference is caused to other licensees.[26] We therefore concluded that establishing a similarly flexible licensing scheme for 800 MHz SMR systems would enable licensees to compete more effectively with cellular and PCS.[27]

10. We also concluded that MTAs were the most suitable geographic "building blocks" for a wide-area SMR licensing framework at 800 MHz because: (1) they represent natural commercial markets that are large enough to enable licensees to take advantage of economies of scale in developing their service;[28] (2) many of the authorized wide-area SMR systems are for MTA-sized areas or larger geographic regions; and (3) they would allow wide-area licenses to be of greater utility if licensees are required to provide co-channel protection to incumbent licensees within their service areas.[29]

11. While we concluded in the *CMRS Third Report and Order* that MTA-based licensing was desirable and feasible, we did not adopt other specific rules for the service at

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[24] *Id.*, ¶ 32.

[25] *CMRS Third Report and Order*, *supra* note 3, ¶ 94.

[26] *Id.*, ¶ 95.

[27] *Id.*, ¶ 97.

[28] In the PCS context, we adopted MTA- and BTA-sized service areas instead of the Metropolitan Statistical Areas (MSAs) and Rural service areas (RSAs) used in our cellular rules in order to allow PCS licensees to benefit from economies of scale. *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 5031, ¶ 76 (1994).

[29] *Id.*, ¶ 99.

that time. We noted that the record in response to the *CMRS Further Notice* included a plan put forward by Nextel, and opposed by many other SMR licensees, whereby the contiguous block of 200 SMR channels in the 800 MHz band would be authorized to a single licensee for its exclusive use throughout an MTA and incumbent licensees within each MTA block would be relocated to other SMR channels.[30] Because the specific elements of the Nextel proposal were not presented in the *CMRS Further Notice*, however, and in light of the variety of other views expressed in the CMRS proceeding, we concluded that adoption of final rules for 800 MHz SMR systems should be deferred and a further notice of proposed rule making in this docket issued to afford an opportunity for further public comment on specific alternatives. In addition, we froze acceptance of new SMR applications pending resolution of this further proceeding. We indicated, however, that we would consider applications on a waiver basis if the applicant could show that the proposed license would not extend coverage beyond the service area and frequencies previously licensed to that applicant.[31]

## III. FURTHER PROPOSAL

12. Based on our review of the record in the *800 MHz* docket and the CMRS proceeding, we propose to adopt a new comprehensive regulatory structure for licensing of 800 MHz SMR providers as outlined in the *CMRS Third Report and Order*. Under this proposal, we would:

- Designate the 10 MHz of contiguous SMR spectrum in the 800 MHz band for licensing in four 2.5 MHz blocks in each MTA[32];
- Designate the remaining 80 non-contiguous 800 MHz SMR Category channels

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[30]*See* Comments of Nextel at 11-12; Reply Comments of Nextel at 13.

[31]*CMRS Third Report and Order, supra* note 3, ¶ 341, n.640.

[32]The FCC authorization for the use of a specified block of 2.5 MHz is referred to herein as an "MTA license." We note that Rand McNally is the copyright owner of the MTA/BTA Listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally's Trading Area System MTA/BTA Diskette, and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide*. The conditional use of Rand McNally's copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994. This agreement covers the 800 MHz SMR service and requires authorized users of the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally's ownership. *See CMRS Third Report and Order, supra* note 3, ¶ 98, n.197 In the *CMRS Third Report and Order*, we indicated that we would license a total of 51 MTAs, which included the 47 Rand McNally MTAs, an Alaska MTA, and three other MTAs comprised of five U.S. possessions (namely, a Guam-Northern Mariana Islands MTA, Puerto Rico-U.S. Virgin Islands MTA, American Samoa MTA). *Id.*, ¶ 99, n. 198. The listing of counties, parishes and census divisions that comprise each BTA and MTA is also available for inspection at the Technical Information Center. (Note that this is a listing of Rand McNally's 47 MTAs and 487 BTAs. Thus the census divisions of Alaska are listed under the Seattle MTA, instead of separately in an Alaska MTA-like service area, and the insular areas are not listed.)

(totalling 4 MHz of spectrum) for local licensing on a channel-by-channel basis[33];

- Dispose of mutually exclusive initial applications for all 800 MHz SMR licenses (both MTA-based and local) through competitive bidding;

- Grant the following rights as part of each MTA license: (1) the right to construct at any available site within the MTA, and to add, subtract, or move site locations within the MTA during the license term, on a "self-coordinated" basis[34]; (2) the right to use any available spectrum within the licensee's designated spectrum block on a self-coordinated basis, including full discretion over channelization of available spectrum within the block (subject to co-channel interference protection of incumbent licensees as discussed *infra*); (3) the right to use any spectrum within the MTA block that is recovered by the Commission from an incumbent SMR licensee in the event of termination of the incumbent's license; and (4) the right to negotiate to acquire incumbent systems within the MTA block, based on our initial finding that such assignments are generally within the public interest and would be approved by the Commission;[35]

- Establish a five-year construction period for MTA licensees from the date the MTA license is granted, with licensees required to provide coverage to one-third of the population within their MTA within three years after initial grant of the MTA license and to two-thirds of their population by the end of the five-year period, and with licenses subject to cancellation for failure to meet these interim coverage requirements;

- Allow incumbent SMR systems within each MTA block to continue operating at previously authorized sites and on previously authorized channels, and require MTA licensees to provide co-channel interference protection to such facilities;

- On the 80 locally licensed channels, limit applicants to obtaining five channels

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[33]The proposed authorizations on the 80 locally licensed channels are referred to herein as "local SMR licenses."

[34]Under self-coordination procedures, prior Commission approval of site and frequency selection is not required, and the licensee is responsible for ensuring that its operations comply with our co-channel interference and geographic separation standards. In addition, the licensee must ensure that such operations do not have a significant effect on the environment as defined in Part 1 of our Rules and comply with applicable air safety requirements as outlined in Part 17 of our Rules.

[35]The Commission nonetheless would make an individualized assessment of the public interest benefits associated with each incumbent-to-MTA licensee transfer as required by Section 310 of the Communications Act.

at a time within any geographic area and require all such channels to be constructed and operating before additional channels can be obtained in the same area; require construction and commencement of operations within 12 months of license grant; and, discontinue acceptance of applications for extended implementation under Section 90.629 of the Commission's rules.

13. In making these proposals, we recognize that the large number of SMR systems already licensed in the 800 MHz band creates complications for converting to a new regulatory regime. We also recognize that while many SMR licensees have expressed interest in providing wide-area service that is comparable to cellular or broadband PCS service, many other members of the SMR community -- particularly operators of smaller systems -- do not seek to provide such service. With these considerations in mind, we emphasize that our goal is to establish a flexible regulatory framework that will promote both diversity and competition in the SMR service. Accordingly, we believe that any rules and policies adopted in this proceeding must promote the following four objectives: (1) providing opportunities for 800 MHz SMR system operators in all areas of the country to develop wide-area systems while also protecting the viability of smaller systems; (2) ensuring that all SMR licensees make productive use of the spectrum by constructing and implementing their systems promptly; (3) encouraging more efficient use of SMR spectrum, particularly in congested areas, through development of technologically advanced systems supporting enhanced services such as seamless wide-area roaming and high speed data transmission; and (4) removing any unnecessary regulatory burdens that hamper the efforts of 800 MHz SMRs to compete effectively with other CMRS offerings.

14. In the following section, we discuss and request comment on the specific elements of our proposal and on a variety of other regulatory issues that will affect the future development of the 800 MHz SMR industry.[36] We request comment on these and any additional issues that parties believe we should address with regard to 800 MHz SMR services and rules.

## IV. DISCUSSION

### A. Channel Assignment and Service Areas

15. In the *CMRS Third Report and Order*, we determined that our SMR channel assignment rules should be revised to facilitate MTA-based licensing in some portion of the 800 MHz SMR band.[37] We deferred the issue of which portion of the band should be used for MTA-based licensing, however, as well as whether this portion should be further divided

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[36]The proposed changes to our technical rules are set forth in Appendix A while our proposals regarding changes to the licensing and competitive bidding rules and procedures are discussed in the Further Notice.

[37]*CMRS Third Report and Order*, *supra* note 3, ¶ 97.

into smaller spectrum blocks. We now propose to divide the existing 14 MHz of SMR spectrum into two categories for purposes of future licensing. The 10 MHz "upper block" would be comprised of the 200 contiguous SMR channels (Channels 401 to 600) and would be licensed on an MTA basis in four blocks of 2.5 MHz each.[38] The remaining 4 MHz, comprised of the 80 non-contiguous channels, would be licensed in groups of up to five channels on a station-by-station basis. We discuss each element of this proposal in greater detail below.

1. Spectrum Designated for MTA Licensing

16. Our proposal to allocate 10 MHz of SMR spectrum for MTA-based licensing is derived in part from the proposal made by Nextel in its comments in the CMRS proceeding.[39] In its comments, Nextel argued that 10 MHz of spectrum constitutes the minimum allocation necessary for an SMR licensee to compete with cellular and broadband PCS providers, many of whom have significantly larger amounts of spectrum at their disposal.[40] Nextel also argued that obtaining contiguous spectrum is essential to the competitive viability of wide-area SMR because it enables systems to use spread spectrum and other broadband technologies that are available to cellular and PCS but unavailable to systems operating on non-contiguous channels.[41]

17. We tentatively conclude that Nextel's proposed distinction between the contiguous "upper" 10 MHz block and the "lower" 4 MHz of non-contiguous channels has merit for purposes of considering what spectrum should be designated for wide-area licensing. In the CMRS proceeding, commenters contended that contiguous spectrum is needed by wide-area SMR systems more than local systems because it allows wide-area systems to utilize advanced technologies to compete effectively with cellular and broadband PCS systems.[42] In the *CMRS Third Report and Order*, we agreed with the proposition that assigning contiguous spectrum,

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[38]Each MTA spectrum block would consist of 2.5 MHz of spectrum comprised of two paired 1.25 MHz blocks of spectrum from the 816-821MHz and 861-866 MHz bands, respectively. This corresponds to the current pairing of SMR channels for two-way communications purposes.

[39]Reply Comments of Nextel at 13.

[40]Comments of Nextel at 11. A cellular licensee is allocated 25 MHz of spectrum in any "cellular geographic service areas" (CGSAs). Broadband PCS licensees may obtain a license for either 30 MHz or 10 MHz of spectrum, and they can aggregate multiple licenses to a maximum of 40 MHz in any BTA or MTA. Thus, under Nextel's proposed channel assignment plan, a SMR licensee for a specific MTA would receive an amount of spectrum equivalent to the minimum spectrum assignment for a broadband PCS licensee, a competing CMRS provider.

[41]Reply Comments of Nextel at 16.

[42]*See* Reply Comments of OneComm at 4-5; Reply Comments of CellCall, Inc. at 7. *See* Appendix D for a list of pleadings in GN Docket No. 93-252 and the acronyms used to cite commenters.

where feasible, is likely to enhance the competitive potential of wide-area SMR providers.[43] Finally, we believe contiguous spectrum offers greater flexibility to wide-area service providers who must tailor their spectrum usage to afford protection to incumbent licensees within the 800 MHz band. Therefore, because the upper 200 SMR channels constitute a contiguous block of spectrum, we tentatively conclude that this block is best suited for wide-area licensing. We seek comment on this tentative conclusion.

18. We also seek comment on our tentative conclusion that the 80 non-contiguous SMR channels should be licensed on a local basis. Because of the diversity of potential uses of SMR spectrum, we believe that it is important not to license the entire 800 MHz service on a wide-area basis. Our proposal to retain 80 channels for local licensing derives from our recognition that not all SMR licensees seek to provide wide-area service and our belief that the interests of potential wide-area service providers should be balanced against the interests of those who prefer to provide more specialized local service. By proposing that 4 MHz of spectrum continue to be licensed on a local basis, we seek to strike a balance between these interests. The proposed allocation of 10 out of 14 MHz to MTA-based systems reflects the fact that wide-area systems seeking to provide high-capacity "cellular-type" service typically require more channels than smaller systems more oriented towards dispatch service. Such wide-area systems also provide more capacity per channel and thus use the spectrum more efficiently. We believe that retaining 4 MHz for local channel-by-channel licensing should be sufficient to meet the needs of service providers who do not require use of large blocks of channels over wide areas. In addition, while we recognize that the lower 80 channels are already heavily licensed, we believe that designating this portion of the spectrum for local use while designating the upper 10 MHz for wide-area use could lead to voluntary frequency swaps between incumbent local systems on upper channels and incumbent wide-area systems on lower channels. We request comment on whether dividing the 800 MHz band spectrum in this fashion is fair and equitable and will lead to efficient spectrum use. We ask commenters who oppose this tentative decision to suggest alternative allocations that would fairly balance the interests of wide-area and local SMR systems.

19. We recognize that the proposed bifurcation of 800 MHz SMR spectrum described above is based on certain assumptions about the future development of SMR service. Nevertheless, we are mindful of the fact that the SMR service is changing due to technological advances. Consequently, today's stand-alone SMR operator could be the cornerstone of tomorrow's wide-area system, which may have a design and structure either similar to or significantly different from current wide-area systems. We are concerned that the natural evolution of the service not be hampered by organized implementation of a wide-area licensing scheme, but also that it does not operate to defeat the goals that motivate today's proposal. In this connection, our objective is to preserve flexibility and the ability to adapt to new competitive conditions for all varieties of SMR service providers. We therefore seek comment on whether the channel assignment principles of our wide-area licensing proposal contain sufficient flexibility to permit continued operation and potential consolidation

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[43] *CMRS Third Report and Order*, *supra* note 3, ¶ 103.

of current stand-alone operators. We ask commenters who oppose this tentative decision to suggest measures by which such flexibility can be incorporated into our wide-area licensing approach.

2. Size of MTA Spectrum Blocks and Spectrum Aggregation Limit

20. While we tentatively agree with Nextel's view that 10 MHz of spectrum should be designated for MTA-based licensing, we are not proposing that the 10 MHz block in each MTA be licensed to a single provider. Such an approach would preclude the possibility of licensing multiple MTA licensees in each market, while dividing the spectrum into multiple blocks would allow applicants to apply for the spectrum they need and the marketplace to decide whether the spectrum is most valuable on an aggregated or disaggregated basis. We also note that some commenters in the CMRS proceeding disagreed with Nextel's contention that 10 MHz is the "minimum" amount of spectrum needed to create a viable competitor to cellular and PCS. These commenters contended that viable, competitive MTA-based SMR systems could be based on fewer channels even though such systems might not be capable of providing the full array of services offered by a cellular or 30 MHz PCS licensee.[44] We therefore propose to divide the 10 MHz "MTA block" into smaller blocks for licensing purposes.

21. In determining the appropriate size of these blocks, however, we believe they should not be so small that a licensee would have difficulty establishing a viable wide-area system on a single MTA block, or so numerous that the transaction costs associated with licensing multiple blocks would outweigh the benefits achieved by using such procedures. In the *CMRS Third Report and Order*, we observed that most commenters agreed that wide-area SMR systems must have the ability to use (and reuse) a large number of channels, preferably on contiguous frequencies, to compete successfully with cellular and broadband PCS.[45] We also observed that in the 1993 *Notice* in PR Docket 93-144 we proposed to allow wide-area licensees to acquire up to 42 channels (equivalent to 2.1 MHz of spectrum) at a time in an MTA. Our rationale at the time for proposing that number of channels was that it reflected the minimum number of channels needed to construct a system based on the technology commonly used by SMR systems to employ frequency reuse.[46]

22. Based on the record in this proceeding and the comments submitted in the CMRS proceeding, we propose to divide the upper 10 MHz of 800 MHz SMR spectrum into four blocks of 2.5 MHz, corresponding to 50 channels per block under our existing frequency allocation rules. These blocks approximate the 42-channel threshold for frequency reuse

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[44]For example, JMTV, Inc. opined that a 10-20 channel block may be appropriate. Reply Comments of JMTV, Inc. at 1.

[45]*CMRS Third Report and Order*, *supra* note 3, ¶ 101.

[46]*See Notice*, *supra* note 1, ¶ 19, n.40.

previously identified in the *Notice*, and would allow for the possibility of licensing more than one wide-area provider in each MTA. We also would allow applicants to bid for multiple blocks within a given MTA, so that the marketplace can determine whether these blocks are most valuable separately or aggregated together. We request comment on whether our proposed allocation is a fair division of channels within the MTA and will lead to efficient spectrum use. Commenters are particularly encouraged to address the appropriateness of alternative block sizes both smaller and larger than 2.5 MHz. In addition, we ask commenters to address whether licensees should be allowed to sub-license portions of larger blocks instead of aggregating smaller blocks.

23. We also seek comment on whether there should be any limit on aggregation of 800 MHz SMR spectrum by a single licensee within a particular MTA. We tentatively conclude that such an aggregation limit is unnecessary. In the *CMRS Further Notice*, we sought comment on whether the ability of CMRS providers to aggregate spectrum should be limited in order to promote competition and protect against excessive concentration of market power. In the *CMRS Third Report and Order*, we concluded that a 45 MHz cap on aggregation of broadband PCS, cellular, and SMR spectrum, combined with existing service-specific caps for cellular and PCS,[47] was sufficient to maintain a competitive CMRS market.[48] In light of this conclusion, we do not believe that establishing an additional aggregation limit within the SMR service is necessary. Assuming that a single licensee were to acquire all 10 MHz of MTA-licensed spectrum for a particular MTA, or even all 14 MHz of 800 MHz SMR spectrum, it would fall well short of the 45 MHz PCS/cellular/SMR spectrum cap. Moreover, its aggregated spectrum holdings would be significantly less than the amount of spectrum that may be aggregated by a cellular or broadband PCS licensee under our service-specific caps for those services. Finally, we note that SMR spectrum is significantly more congested than broadband PCS or cellular spectrum, further limiting the potential anti-competitive consequences of aggregation. Based on these factors, we tentatively conclude that there is virtually no risk that allowing unrestricted aggregation of SMR spectrum would have an adverse effect on CMRS competition. In fact, we are concerned that limiting SMR aggregation could handicap the providers of SMR services that we have determined to be potential competitors to broadband PCS and cellular providers with equal or larger spectrum holdings. We therefore propose to allow SMR licensees to seek and (if they are the high bidder for all blocks) obtain all of the MTA spectrum blocks in a market. We seek comment on this proposal.

### 3. Licensing of Non-Contiguous Local Channels

24. We propose to continue licensing SMR systems on the "lower 80" channels on a

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[47] A broadband PCS licensee is limited to 40 MHz of PCS spectrum (10 MHz for in-region cellular providers for 5 years and 15 MHz thereafter) in any geographic area. Similarly, a cellular licensee is limited to 25 MHz of cellular spectrum in any geographic area. *CMRS Third Report and Order*, *supra* note 3, ¶ 239.

[48] *Id.*, ¶ 238.

local basis in order to provide opportunities for SMR operators who seek to provide local as opposed to MTA-based service. We ask commenters to address two alternative approaches to local SMR licensing. The first alternative would be to continue licensing these channels based on the same geographic separation and channelization criteria that exist in our current SMR rules. Thus, applicants on these channels would be limited to seeking available sites and channels on a station-by-station, channel-specific basis. While this proposal arguably perpetuates some of the administrative burdens imposed by the current SMR rules, we believe it is a suitable approach for assigning spectrum to applicants who seek to provide local SMR service and require a relatively limited number of channels. Because these channels are already heavily licensed, using the current method of local licensing may be preferable in order to ensure continuity and minimize disruption in the future assignment of spectrum for local use. We also note that some of the administrative burdens of site-specific licensing have been eliminated by our decision in the *CMRS Third Report and Order* to eliminate the "40-mile rule" and loading requirements for all SMR licensees.[49]

25. The second local licensing alternative would be to discontinue site-specific licensing and instead offer licenses for individual channels or small channel blocks covering defined geographic areas. While we believe site-specific licensing is feasible, we are concerned about the practicality of selecting among mutually exclusive applicants with overlapping but not identical service areas. We note that area-specific licensing offers certain administrative advantages over site specific-licensing. In particular, given our decision to use competitive bidding procedures to select among mutually exclusive applicants, using defined service areas simplifies the problem of identifying mutually exclusive applications and implementing such procedures. In addition, area-specific licensing gives licensees greater flexibility to modify their systems within a designated area to adapt to changing customer demands. We therefore seek comment on whether this alternative would be preferable to continued site-specific licensing of the "lower 80" channels. We also seek comment on what service areas should be used and whether the 80 channels should be licensed individually or in blocks. With respect to service area, we believe BTAs could be an appropriate geographic area for local licensing, but we seek comment on alternative area definitions as well. We also seek comment on whether licensees should be able to disaggregate licensing areas to provide opportunities for service providers who seek to serve smaller areas. With respect to channels, we note that these 80 channels have previously been licensed in 5-channel blocks.[50] We therefore seek comment on whether we should continue to license these channels in 5-channel blocks so that existing licensees may seek the right to expand local systems on the same channels, or whether we should license fewer channels in each block. Finally, we seek comment on any possible alternatives for licensing of the "lower 80" channels that might further promote the ability for SMR operators to quickly gain access to spectrum and to provide efficient service to the public.

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[49] *See CMRS Third Report and Order*, *supra* note 3, ¶¶ 190, 192. These rules are set forth at 47 CFR §§ 90.623(c) (conventional), 90.627(b) (trunked), 90.631 (trunked), 90.633 (conventional).

[50] *See* 47 CFR § 90.617(c), Table 4A.

26. Although our alternative proposals for licensing on the "lower 80" channels are intended to accommodate the needs of local systems, we do not seek to prohibit use of these channels in connection with wide-area systems. Thus, we propose to allow licensees to use these channels for any purpose that is technically consistent with our rules, whether as part of a local system or a wide-area system.[51] We also do not propose to restrict the ability of licensees on these channels to aggregate channels or integrate local systems to provide service over a larger area. In light of our proposed designation of 10 MHz of spectrum for MTA licensing, however, we wish to ensure that our rules do not inadvertently allow MTA licensees to acquire large numbers of non-MTA channels primarily intended for local use. We therefore tentatively conclude that a limit should be placed on the number of non-MTA channels that an applicant may obtain at one time in an area without constructing and commencing operations on previously licensed channels in the same area.[52] Specifically, we propose to limit grants of the "lower 80" channels to no more than five channels at one time, which is the applicable limit under our current rules.[53] In addition, in order to protect against channels being underutilized for long periods, we propose to cease accepting requests for extended implementation on these channels and to adhere strictly to the 12-month construction requirement for all newly licensed SMR systems classified as CMRS.[54] We seek comment on the potential effectiveness of these proposals and on whether there are alternative mechanisms that could be employed to protect against spectrum warehousing in this service.

4. Licensing in Mexican and Canadian Border Areas

27. Our proposal for bifurcating the 800 MHz SMR band requires us to consider how to deal with SMR allocations in the Mexican and Canadian border areas, which differ from allocations in the rest of the nation.[55] Specifically, in the Mexican border area, SMR channel

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[51]Conversely, we do not propose to preclude MTA licensees from establishing facilities to provide local service within their MTA blocks, provided that they meet their overall coverage obligations.

[52]*See CMRS Third Report and Order*, *supra* note 3, ¶ 193. As discussed in Section IV(B)(3)(a) *infra*, we are seeking comment on whether a defined protected service area should be adopted for incumbent local systems. If a defined service area is adopted, then such area also would define the geographic boundaries for the proposed limitation on requests for additional channels.

[53]*See* 47 CFR § 90.621(a)(1)(iv).

[54]*See CMRS Third Report and Order*, *supra* note 3, ¶ 181. As we indicated in the *CMRS Third Report and Order* although SMR licensees will be allowed to use these channels as part of a larger wide-area SMR system on a site-by-site basis, all stations authorized on such channels must be constructed within 12 months. *Id.*

[55]*See* 47 CFR §§ 90.615(a)(5), Table 4A, 90.619(b)(8), Table 12, 90.619(b)(9), Table 16, 90.619(b)(10), Table 20, and 90.619(b)(11), Table 24 for channels available near the Mexican and Canadian borders. Frequency requests 110 km (68.4 miles) or less to the Mexican border are considered to be in the Mexican border area. Frequency requests 140 km (87 miles) or less to the Canadian border are considered to be in the Canadian border area. Moreover, the Canadian border area is divided into 8 regions, from the east to the west of the United States, with differing requirements.

availability is limited to 30 of the "upper" 200 channels in the proposed MTA band, 5 of the lower 80 non-contiguous channels, and 60 additional channels reserved for SMR use in the border area that are allocated to non-SMR services elsewhere. Moreover, these channels are offset 12.5 kHz lower in frequency than the corresponding SMR channels in non-border areas.[56] In the Canadian border area, SMR channel availability varies by region, with the majority of regions having between 55 and 120 channels in the proposed MTA band, none of the lower 80 channels, and some additional channels outside of either group.

28. Because SMR licensees operating in border areas have access to only a portion of the spectrum we have proposed to allocate for MTA licensing, we seek comment on whether we should designate other SMR channels for MTA-based use in these areas. Possible options could include allowing use of the lower 80 non-contiguous channels by MTA licensees or the aggregation of channels from among the four 50-channel blocks that are available in border areas and offering them for bidding in a single block of comparable size or in multiple blocks of smaller size. We tentatively conclude, however, that attempting to create different allocations in border areas would be administratively unworkable. First, we note that the Commission-defined border areas do not coincide with MTA boundaries. Second, to the extent that less spectrum is available to MTA licensees in border areas, we believe that applicants can assess the impact of more limited spectrum availability in their valuation of those blocks for competitive bidding purposes. Based on these factors, we propose to license MTA blocks on a uniform basis without distinguishing border from non-border areas, *i.e.*, MTA licensees will be entitled to use any available border area channels within their spectrum blocks, subject to the relevant rules regarding international assignment and coordination of such channels. We seek comment on this proposal.

29. We also request comment on how to license the channels in border areas that are not contained in the 200-channel MTA block, which include both lower 80 SMR channels and channels that are allocated to non-SMR services outside the border areas. In general, we propose to license these channels on a channel-by-channel basis under the same rules we adopt for the lower 80 channels in non-border areas. We ask commenters to discuss whether this approach is appropriate for these channels or whether some other channel assignment mechanism would better serve the public interest.

## B. Rights and Obligations of MTA Licensees

### 1. Operational Flexibility

30. We believe that a key element in any new licensing scheme for wide-area SMR systems is that licensees be extended the same flexibility, to the extent feasible, as cellular and PCS licensees in terms of the location, design, construction, and modification of their facilities throughout their service area. Accordingly, we tentatively conclude that MTA licensees in the 800 MHz band should be authorized to construct stations at any available site and on any

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[56] *See* 47 CFR § 90.619(a).

available channel within their MTAs. We also propose to allow MTA licensees to "self-coordinate" system modifications within their service areas, *i.e.*, to add, subtract, move, and otherwise modify their base station facilities without any need for prior Commission consent, provided they notify the Commission of the coordinates and certify compliance with our co-channel interference protection and emission mask requirements. This simplified approach toward initial licensing and subsequent system modification will substantially reduce the existing administrative burden on both SMR licensees and the Commission, and will establish greater consistency with our cellular and PCS licensing rules.

31. While we believe that operational flexibility is a substantial benefit of MTA licensing, we recognize that this flexibility will be limited by the large number of systems already authorized and operating in the 800 MHz band, particularly in major markets. Even if MTA licensees will not immediately obtain clear spectrum comparable to our allocations for cellular or broadband PCS, however, we believe that MTA licensing will confer other valuable rights on the licensee that will enhance its ability to establish wide-area service. First, we propose that if an incumbent fails to construct, discontinues operations, or otherwise has its license terminated by the Commission, the spectrum covered by the incumbent's authorization should automatically revert to the MTA licensee who has obtained the contingent rights to that spectrum. Second, we propose that the MTA license confer the right to negotiate with incumbent systems within the MTA to purchase or relocate their facilities. In this regard, we propose that any request for transfer or assignment of an incumbent authorization to the MTA licensee be presumptively considered in the public interest, although we also intend to review each such request as required by Section 310(d) of the Communications Act. While we do not propose to make relocation of incumbent licensees mandatory (*see* Section IV(B)(2) *infra*), we believe that these are potentially valuable rights nonetheless. In addition, granting these rights to the MTA licensee will eliminate much of the administrative burden on both licensees and the Commission with respect to future management of the spectrum contained in the MTA blocks. We seek comment on these proposals and other alternatives, including the costs and benefits associated with each alternative in markets that are heavily occupied by incumbent licensees.

2. Treatment of Incumbent Systems

32. Given the large number of systems already authorized in the 800 MHz SMR service, a crucial issue associated with our wide-area licensing proposal is its impact on existing 800 MHz SMR licensees. Particularly, we are concerned about the potential effect on the operations of local SMR licensees occupying the upper 200 channels which, under the new licensing scheme, would be designated for MTA-based licensing. In our 1993 EMSP proposal, we proposed that incumbent licensees be allowed to continue operating under their existing authorizations and that wide-area licensees provide co-channel protection to all such systems constructed and operating within their service areas. Nextel, on the other hand, proposed in the CMRS proceeding that local SMR licensees occupying newly-designated wide-area SMR spectrum be required to "retune" their equipment to operate on other available SMR channels. Nextel further proposed that the cost of retuning, which it argued would not

be significant, would be paid by the wide-area licensee, and that no licensee would be forced to move off its frequencies unless acceptable alternative frequencies were available.[57]

33. As indicated in the *CMRS Third Report and Order*, the mandatory relocation aspect of Nextel's proposal received vigorous and widespread opposition from existing SMR licensees.[58] While many commenters in the CMRS proceeding favored wide-area licensing, many also focused on the need for any such plan to take into account the needs of other segments of the SMR industry.[59] The reasons for these commenters' opposition to Nextel's proposal included: (a) Nextel's alleged failure to address the practical problems associated with "retuning" (such as equipment replacement, management agreements, and renegotiation of site leases); (b) the unavailability of 800 MHz trunked SMR channels in most markets, thus requiring relocated SMR licensees to compete for a few conventional SMR channels;[60] (c) the lack of sufficient alternative spectrum; and (d) the impairment of small existing analog SMR licensees' ability to convert to wide-area operation.[61]

34. Based on the record in this proceeding and the numerous comments regarding the Nextel proposal, we tentatively conclude that incumbent SMR systems should not be subject to mandatory relocation to new frequencies pursuant to Nextel's proposed "band-clearing" approach. We are concerned that mandatory relocation could impose significant cost and

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[57]Comments of Nextel at 11-12.

[58]*See* Comments of Pittencrieff at 7; Comments of NABER at 14-17; Reply Comments of ITA/Alliance of Private 800/900 MHz Licensees at 2-5; Reply Comments of Joriga Electronics, Inc. at 6; Reply Comments of Fetterman at 2-3; Reply Comments of Don Cook at 2-3; Reply Comments of Eden Communications, Inc. at 1-3; Reply Comments of The Ericsson Corporation at 1-4; Reply Comments of PCC Management Corporation at 2; Reply Comments of T & K Communication Systems, Inc. at 1-2; Reply Comments of Fresno Mobile Radio, Inc. at 1; Reply Comments of Southeastern SMR Association at iii, 19-22; Reply Comments of The Southern Company at 25-35; Reply Comments of Russ Miller Rental at 2-9; Reply Comments of USITV/Hunter at 3-4; Reply Comments of JMTV, Inc. at 1; Reply Comments of RMTV, Inc. at 1; Reply Comments of Mobile U.H.F., Inc. at 1-2.

[59]*See, e.g.*, Comments of US Sugar in response to *CMRS Further Notice* at 10 (recommending retention of existing channel assignment rules for traditional SMR systems while establishing a different licensing mechanism for wide-area SMR licensees which considers the traditional SMR systems' expansion needs); Comments of Russ Miller Rental in response to *CMRS Further Notice* at 4 (noting the likelihood that local SMR licensees will continue to enter into joint ventures to be more competitive and suggesting that we should permit such licensees to implement pseudo-wide-area SMR systems); Comments of NABER in response to *CMRS Further Notice* at 13 (contending that one of the goals of a service-area based licensing approach should be to enable small SMRs to "continue to operate and have access to spectrum for growth where available").

[60]Conventional SMR systems operate on one to four channels with no trunking allowed, *i.e.*, users must scan each channel for available air time. Trunked SMR systems use blocks of five or more channels, with users automatically routed to an available channel.

[61]*See e.g.*, Reply Comments of Eden Communications, Inc. at 3; Reply Comments of The Ericsson Corporation at 3-4; Comments of NABER at 11.

disruption on incumbent licensees and their customers. Even if we limit mandatory relocation to instances where there are substitutable channels available and require the costs of relocation to be paid by the MTA licensee, we are also concerned that mandatory relocation would inevitably draw the Commission into disputes between licensees over substitutability of channels, compensable costs, and other related issues. In addition, relocation is likely to be complicated as a practical matter by a lack of sufficient alternative frequencies in many markets to accommodate all incumbents in the MTA blocks on a one-to-one basis. If this is the case, mandatory relocation could require us to become involved in decisions about which incumbents are required to relocate and which are not.

35. Instead of mandating relocation, we prefer to allow MTA licensees and incumbents to negotiate relocation, frequency swaps, mergers, purchases, or other arrangements on a voluntary basis. Many licensees who are currently building wide-area SMR systems (and are likely to bid on MTA licenses where such systems are located) have previously used such transactions to acquire consolidated blocks of frequencies, and we fully expect this process to continue. We therefore tentatively conclude that decisions regarding relocation should be left to the parties and the marketplace. We ask commenters to address whether relying on voluntary negotiations between MTA licensees and incumbents will continue to provide sufficient inducement for incumbents to relocate. We also request comment on whether the Commission should intervene if incumbents refuse "reasonable" inducements to relocate. We further request that such comments identify or define what constitutes a "reasonable" inducement and the specific form of intervention, if any, that should be taken by the Commission in those instances when the incumbent has refused such inducements.

36. While we tentatively conclude that mandatory relocation will not be required, we nonetheless seek further comment on this option as an alternative to voluntary arrangements between MTA licensees and incumbents. For example, one possible alternative would be to establish procedures analogous to our provisions in the *Emerging Technologies* docket for relocation of microwave licensees from the 2 GHz PCS band.[62] Under this alternative, we would establish an initial period (*e.g.*, two years) for MTA licensees and incumbent systems to negotiate voluntary relocation agreements. After the expiration of this two-year period, an MTA licensee would be able to initiate a one-year mandatory period regarding relocation terms upon written request to the incumbent licensee for the channel on which it is operating. During this period, both the MTA licensee and the incumbent licensee would be required to negotiate in good faith. If no agreement was reached by the end of this one-year period, the MTA licensee would then be able to request mandatory relocation of the incumbent, provided that it would (1) demonstrate the availability of fully comparable alternative frequencies, (2) guarantee payment of all relocation expenses, including all engineering, equipment, site,

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[62] *See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992), *Second Report and Order*, 8 FCC Rcd 6495 (1993), *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589.

and regulatory fees, as well as any reasonable additional costs that the relocated licensee may incur, and (3) construct new SMR facilities, if necessary, and test them for comparability to the existing system. We seek comment on this alternative, and particularly on possible mechanisms for ensuring that all relocation costs to incumbents would be guaranteed by the MTA licensee. In addition, we ask commenters to describe the specific costs, both direct and indirect, that would be associated with relocation, including approximations of the magnitude of such costs and whether they should be fully reimbursable by the MTA licensee. We also seek comment on whether MTA licensees should be required to offer some form of premium over cost (*e.g.*, additional channels or improved facilities) if they seek to invoke a mandatory relocation option.

37. Even in those situations where incumbents are allowed to continue operating on already-licensed facilities, we tentatively conclude that incumbent systems should not be allowed to expand beyond their existing service areas on MTA-licensed channels without the consent of the MTA licensee (unless, of course, the incumbent in question is itself the MTA licensee for the relevant channels). Allowing non-MTA licensees to expand their systems at will after MTA licensing has occurred would substantially diminish the value of the MTA license and would create continuing uncertainty for MTA applicants and licensees alike. By restricting incumbents' ability to expand, we seek to preserve the value of the MTA license and to give the MTA licensee the maximum opportunity to build viable systems while allowing the incumbent to remain. Although we propose to restrict incumbent licensees' ability to expand their systems on spectrum covered by MTA licenses, we do not want to take any action that would prevent incumbent local systems from remaining viable. Therefore, we propose to allow incumbent licensees to freely modify their facilities provided such modifications do not expand their service areas. In addition, we emphasize that MTA licensees and incumbents would be free to negotiate voluntary arrangements that allow an incumbent to expand its system within an MTA block.[63] Finally, we recognize that there may be circumstances where an MTA licensee should be required to permit incumbents to make minor alterations to their service areas to preserve the viability of their systems (*e.g.*, moving a transmitter because of loss of site). We believe that generally restricting incumbents' ability to expand on MTA spectrum blocks while providing incumbents with limited flexibility to modify their systems as described above would strike a fair balance between the interests of the incumbents and those of the MTA licensees. We ask commenters to address the advantages and disadvantages of these proposals and to provide specific examples of the circumstances under which incumbents should be permitted to modify their systems.

### 3. Co-Channel Interference Protection

38. As we observed in the *CMRS Further Notice*, we have imposed co-channel interference obligations on mobile service licensees to ensure that they do not cause interference to adjacent licensees operating on the same frequency. For those services with

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[63]Incumbent licensees are also free to acquire non-MTA channels in the 800 MHz band to augment their existing SMR holdings.

Commission-defined service areas (such as cellular, broadband PCS, and narrowband PCS), our rules are typically designed to prevent interference at or near service area boundaries. On the other hand, for those services with station-defined service areas (such as Public Land Mobile Services, 900 MHz paging, and local 220-222 MHz service), each base station in the licensee's system must be located and operated in accordance with geographic separation standards and/or field strength limits in order to ensure that the co-channel stations of other licensees are protected from interference. In the *CMRS Third Report and Order*, we concluded that, as a general matter, we would retain our existing co-channel protection rules for CMRS licensees.[64] We indicated, however, that 800 MHz MTA licensees would have dual co-channel interference protection obligations -- protection of incumbent co-channel facilities and protection of the facilities of an MTA licensee in a neighboring MTA.

*a. Incumbent SMR Systems*

39. In the *CMRS Third Report and Order*, we concluded that wide-area licensees would continue to be subject to existing station-specific interference criteria with respect to all incumbent co-channel stations.[65] Under these rules, an MTA licensee would be required to afford protection to incumbents as provided by § 90.621(b) , either by locating its stations at least 113 km (70 mi) from the facilities of any incumbent, or by complying with the co-channel separation standards set forth in our "short-spacing" rule if it seeks to operate stations located less than 113 km (70 mi) from an incumbent licensee's facilities.[66] We ask commenters to address whether applying these existing interference requirements to MTA licensee protection of incumbents would hamper the MTA licensee's ability to fully construct its system.

40. We also request comment on whether, in addition to requiring MTA licensees to protect incumbents in accordance with our co-channel protection interference criteria, we should incorporate provisions that would enable incumbent systems operating on the "upper 200" channels to construct stations anywhere within a defined protected service area. Although we have traditionally applied the protected service area concept to non-cellular Part 22 services, it has never been incorporated into our Part 90 rules. The potential advantage of adopting a protected service area definition is that it would give incumbent systems the opportunity to establish new "fill-in" base stations within a defined area without the need for prior application to the Commission following station construction. We therefore seek

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[64] *CMRS Third Report and Order, supra* note 3, ¶ 143.

[65] *Id.*, ¶ 145.

[66] 47 CFR §90.621(b)(4). The distances in the Table calculated based on the requirement that the 22 dBu signal strength contour of a proposed station does not fall within the 40 dBu signal strength contour of an existing station.

comment on whether to establish a fixed-radius protected service area (*e.g.*, 30 kilometers)[67] for existing SMR systems. Under this proposal, we would allow the incumbent licensee to construct new base stations within this radius of its originally authorized station provided that the 40 dBu signal strength contour of the existing station would not be extended by the new base stations.[68] This would enable an incumbent licensee to add low power sites to its systems within a defined area without expanding its service area at the expense of the MTA licensee. We request comment on the suitability of this proposed service area definition and ask commenters to include a technical analysis of this proposal or any alternative proposals that permit greater flexibility for locally licensed SMR systems.

*b. Adjacent MTA Licensees*

41. In the *CMRS Third Report and Order*, we also concluded that the co-channel interference protection obligations of MTA licensees with respect to other MTA licensees would be similar to those imposed in the cellular and PCS services. Cellular and PCS licensees are required to comply with interference protection criteria between Commission-defined service areas only at service area borders.[69] Similarly, we tentatively conclude that wide-area SMR licensees in the 800 MHz band should not be allowed to exceed a signal level of 22 dBuV/m at their service area boundaries (unless they negotiate a different signal strength limit with all potentially affected adjacent licensees). This approach, although somewhat conservative, is consistent with our co-channel protection rules for Subpart S stations operating above 800 MHz, which provides that the undesired or interfering signal level at the edge of a station's service area should not exceed 22 dBuV/m.[70] We request comment on whether this is an appropriate field strength level for a wide-area licensee's operations at its service area border. Additionally, we ask commenters to address whether we should use 40 dBuV/m as the measure of the desired signal level at the service area border. We also propose to require MTA licensees utilizing field strength levels greater than the one ultimately adopted to coordinate with and obtain concurrence from all bordering SMR MTA licensees. We seek comment on whether this restriction would further our goal of avoiding harmful interference without being an overly burdensome requirement.

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[67]This distance corresponds roughly to the 40 dBu signal strength contour of an SMR station operating at maximum authorized power (1000 watts ERP) and maximum authorized antenna height (305 meters).

[68]Under this proposal, an incumbent who constructed low-power stations that maintained the 40 dBu contour of its original station would not be subject to the requirements of the short-spacing table in relation to the MTA licensee (*see* 47 CFR § 90.621(b)(4)), *i.e.*, the incumbent would be entitled to construct low-power stations up to 30 kilometers from its originally authorized site even if the resulting stations were less than 88 kilometers from stations of the MTA licensee, the minimum distance otherwise required by our short-spacing rules.

[69]*Id.*

[70]*See Co-Channel Protection Report and Order*, *supra* note 7, ¶¶ 5-8.

### 4. Emission Masks

42. As a protection against adjacent channel interference, we have subjected most mobile radio services to emission mask rules that restrict transmitter emissions on the spectrum adjacent to the licensee's assigned channel. In the *CMRS Third Report and Order*, we affirmed our out-of-band emission rules for CMRS services.[71] We did determine, however, that out-of-band emission rules should apply only where emissions have the potential to affect other licensees' operations.[72] Also, we concluded that where a licensee has exclusive use of a block of contiguous channels, such as in cellular and PCS, out-of-band emission rules would be applied only to the extent necessary to protect operations outside of the licensee's authorized spectrum. We indicated that we would extend this approach to channel blocks assigned to MTA-based SMR systems, except to the extent that MTA licensees would also be required to provide adjacent channel protection to "interior" channels used by incumbent licensees.[73]

43. In this connection, we propose to apply out-of-band emission rules only to the "outer" channels included in a MTA license and to spectrum adjacent to interior channels used by incumbents. We believe that these channels alone have the potential to affect operations outside of the MTA licensee's authorized bandwidth. Moreover, this approach is consistent with the action we took in the broadband PCS context. Our specific proposal for an 800 MHz SMR emission mask rule is that for any frequency outside an MTA licensee's frequency block, the power of any emission shall be attenuated below the transmitter power (P) by at least 43 plus 10 $\log_{10}$ (P) decibels or 80 decibels, whichever is the lesser attenuation. We tentatively conclude that this emission mask would adequately protect other MTA licensees. This proposed emission mask rule is identical to that adopted for broadband PCS. We seek comment on this proposal. Specifically, we ask commenters to include a technical analysis of our proposal and discuss alternatives appropriate for any unique operational issues presented by MTA-based SMR systems.

## C. Construction Requirements

44. In the *CMRS Third Report and Order*, we established a uniform 12-month period for constructing a standard base station in all CMRS services that are licensed on a channel-by-channel basis.[74] As a result, licensees of SMR systems are presumptively subject to this 12-month construction period. Although we eliminated the loading requirements applicable to SMR licensees, we indicated that we would protect against spectrum warehousing through

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[71] *CMRS Third Report and Order*, *supra* note 3, ¶ 160.

[72] *Id.*, ¶ 161.

[73] *Id.*

[74] *Id.*, ¶ 177.

other measures. In particular, as discussed in Section IV(A)(3), *supra*, we propose to no longer permit extended implementation under § 90.629 on the "lower 80" channels. We also propose to require that licensees of local SMR systems commence service to subscribers by the end of their construction period. As adopted in the *CMRS Third Report and Order*, "service to subscribers" is defined to mean the provision of service to at least one party not affiliated with, controlled by, or related to the CMRS provider.[75] We seek comment on whether strict enforcement of this construction period will be an adequate protection against spectrum warehousing on frequencies occupied by local SMR systems.

45. With respect to CMRS systems licensed on an MTA basis, we determined that the record in the *CMRS* proceeding generally supported use of longer construction periods combined with interim coverage requirements to ensure that licensees begin providing service to portions of their service area before the construction period expires.[76] Notably, such an approach has been used for cellular service and recently adopted for both broadband and narrowband PCS. Consequently, we concluded in the *CMRS* docket that 800 MHz wide-area SMR systems should be subject to similar requirements noting that it would be necessary to tailor these requirements to reflect certain circumstances unique to the SMR service.

46. Based on the record in the *CMRS* proceeding and this docket, we tentatively conclude that MTA licensees should have five years to construct their systems. While this is shorter than the construction period for PCS systems, we believe it is the most appropriate time period in the 800 MHz SMR context. First, under our current rules, SMR licensees can request up to five years to construct a wide-area system in the 800 MHz band.[77] Second, considering the substantial construction of SMR systems (including wide-area systems) that has already occurred in the 800 MHz band, the ten-year construction period applicable to PCS appears excessive for the service.[78] Third, although a five-year construction period may give some MTA licensees more time to construct certain facilities than might otherwise have been allowed,[79] we believe that MTA licensees should have flexibility to adjust their construction plans to adapt to the requirements of constructing MTA-based systems. In fact, some pre-

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[75] *CMRS Third Report and Order*, *supra* note 3, ¶ 178.

[76] *Id.*, ¶ 179.

[77] 47 CFR § 90.629.

[78] We expect that several of the MTA licensees will be existing wide-area licensees who already have begun constructing systems under existing authorizations which will be folded into their MTA-based systems. Thus, an extremely lengthy construction period would not be necessary.

[79] For example, because the construction period for an MTA license would commence with the issuance of the license and apply to all of the licensee's stations on the MTA channel block (including stations that may have been subject to an earlier construction deadline arising from a pre-existing authorization), there is the potential that the MTA licensee would ultimately receive more than five years in which to construct their system as a result of our proposed rule changes.

existing wide-area licensees may need this additional time to modify their constructed systems so that they comply with our new technical and operational requirements. Fourth, we anticipate that MTA licensees with a built-in investment in existing systems will have incentive to construct facilities and provide service promptly to ensure a return on that investment. Finally, we believe that the use of competitive bidding to select MTA licensees should provide ample incentives for rapid system construction since to do otherwise would not allow them to recover their bidding expenses.

47. As noted above, some existing wide-area SMR licensees have been granted an extended implementation period of up to five years pursuant to either a waiver of our rules or § 90.629 of our Rules.[80] In light of our proposal of a five-year construction period for MTA licensees, we request comment on how existing licensees with extended implementation periods should be treated. Under our rules, any extended implementation period authorized pursuant to § 90.629 is "conditioned upon the licensee constructing and placing its system within the authorized implementation period and in accordance with an approved implementation plan of up to five years."[81] The licensee also is required to submit annual certifications of compliance with its yearly station construction commitments. In addition, if the Commission concludes, at any time, that the licensee has failed to meet such construction commitments, it may terminate extended implementation and give the licensee six months from the date of termination to complete construction of the system. We ask commenters to discuss whether existing licensees with extended implementation periods should be given that full period to construct their systems; or, in the alternative, if they should be given some shorter period unless they submit a detailed showing that the construction to date is consistent with their original implementation plan. We also ask commenters to address what is a reasonable timeframe for completing such systems given the technologies presently available in the SMR market. In addition, we seek comment on whether licensees who have received extended implementation should be treated differently depending upon whether they become an MTA licensee.

48. In the *CMRS Third Report and Order*, we also concluded that 800 MHz wide-area SMR licensees should be subject to interim coverage requirements that are similar to those in the cellular and PCS rules.[82] Our current PCS rules require 30 MHz broadband PCS licensees to provide coverage to one-third of the population of their service area within five years of initial license grant and to two-thirds of the population of their service area within ten years; while the 10 MHz licensees are required to provide coverage to one-fourth of the population of their service area within five years, or alternatively, to submit a showing to the

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[80]See Fleet Call, Inc., *supra* note 9; 47 CFR § 90.629. Only those grants of extended implementation period that preceded our 1993 adoption of § 90.629 were given pursuant to a waiver of our rules.

[81]47 C.F.R § 90.629(c).

[82]*CMRS Third Report and Order*, *supra* note 3, ¶ 180.

Commission that they are providing substantial service.[83] We tentatively conclude that MTA licensees in the wide-area SMR service should be held to a coverage standard comparable to that required of 30 MHz PCS licensees. We therefore propose that MTA-based SMR licensees be required to provide coverage to one-third of the population within their MTA within three years of initial license grant and to two-thirds of the population by the end of their five-year construction period. Because 10 MHz PCS licensees are licensed to serve smaller geographic areas, namely, BTAs, and designed primarily to provide a more limited array of services, we believe that it is more appropriate to adopt coverage requirements similar to those for MTA-based licensees. Although we impose the interim coverage requirements at three and five years rather than five and ten years, we nonetheless believe such requirements to be reasonable in light of pre-existing SMR construction as discussed above. We seek comment on this proposal and whether a specific definition of what constitutes coverage should be adopted for this service, *e.g.*, should we consider single channel coverage sufficient or should we impose a multi-channel coverage requirement, given the substantial licensing of the service.

49. In the *CMRS Third Report and Order*, we also noted that any interim coverage requirements for wide-area SMR systems must account for the fact that MTA licensees may be required to provide co-channel protection to incumbent systems within their service area.[84] We believe that when a licensee acquires an MTA license, it assumes the responsibility of obtaining the right to use sufficient spectrum to provide coverage if such spectrum is not already available. We contemplate that this could be achieved either directly (by utilizing available spectrum authorized to the MTA licensee or acquiring such spectrum through buy outs of incumbent licensees within its authorized MTA block) or indirectly (through resale or other similar types of agreements with incumbents). In light of the significant amount of spectrum licensed to the MTA licensee, we do not believe that it would be in the public interest to allow such spectrum not to be fully utilized for an extended period of time. Accordingly, we believe that an MTA licensee must satisfy its coverage requirements regardless of the extent of the presence of incumbents within its MTA block. As a practical matter, we believe this will also discourage applicants who have a limited ability to provide coverage within an MTA from seeking MTA licenses for anti-competitive reasons, *e.g.*, to block potential acquisition of the MTA license by an applicant who already provides substantial coverage. We ask commenters to address the advantages and disadvantages of these proposals and any alternatives.

50. Our imposition of interim coverage requirements also raises the issue of what happens in the event that an MTA licensee does not satisfy such requirements. In this regard, we tentatively conclude that an MTA licensee's failure to meet the coverage requirements imposed either at the third or fifth years of its construction period should result in forfeiture

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[83] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314. *Memorandum Opinion and Order*, 9 FCC Rcd 5947 (1994), ¶ 155.

[84] *CMRS Third Report and Order*, *supra* note 3, ¶ 180.

of the license. This penalty for failure to comply with construction requirements is consistent with the penalties provided in our broadband PCS rules.[85] In addition, such action would allow the spectrum to be made available to other qualified applicants. We request comment on this proposal and its alternatives.

## D. SMRs on General Category Channels & Inter-category Sharing

51. Currently, 800 MHz SMR licensees may be licensed on the 150 channels in the General Category[86] or licensed under our inter-category sharing rules on 100 channels in the Industrial/Land Transportation and Business Categories (collectively, "Pool Channels").[87] In the *Notice*, we sought comment on reuse of non-SMR Category channels by wide-area licensees. We also sought comment on whether the availability of inter-category sharing channels to SMR licensees should be limited because depletion of SMR Category frequencies by wide-area licensees might increase SMR demand for out-of-category assignments to otherwise unacceptable levels.

52. Although we believe that SMR licensees with existing operations on the General Category or Pool Channels should be allowed to continue their operations on such channels, we also believe that some restriction on future SMR applications on General Category and Pool Channels may be appropriate. General Category Channels are expressly designated for use not only by SMR licensees, but also by Public Safety licensees and PMRS providers in the Industrial/Land Transportation and Business service categories. Because we have allocated these channels for extensive PMRS as well as CMRS use, we determined in the *Competitive Bidding Second Report and Order* that these channels are not subject to competitive bidding.[88] Consequently, we are concerned that continuing to allow SMR applications for these channels could result in a scarcity of frequencies for PMRS uses. Similarly, the Pool Channels are intended for non-commercial internal use by Business and Industrial/Land Transportation licensees, and their availability for SMR licensees was intended to be on a limited basis only. Thus, if these channels remain available to SMR licensees and not subject to auctions, demand for the channels by SMR applicants seeking to avoid auctions may render them unavailable to other Part 90 services that need and are eligible for them.

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[85] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, ¶ 134 (1993).

[86] 47 CFR § 90.615(a). Pursuant to § 90.615 of our Rules, frequencies in the 806-809.750/851-854.750 MHz bands (Channels 1-150) are allocated to the General Category for conventional operations.

[87] 47 CFR § 90.621(g)(2), (3). Pursuant to § 90.621 of our Rules, frequencies in the 806-821/851-866 MHz bands are available for inter-category sharing under certain specified conditions.

[88] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, ¶ 47 (1994) (*Competitive Bidding Second Report and Order*), *recon. Second Memorandum Opinion and Order*, FCC 94-215, adopted August 12, 1994, released August 15, 1994 (*Competitive Bidding Reconsideration Order*).

53. In light of these concerns, we tentatively conclude that we should revise our eligibility rules for the General Category and Pool Channels to prohibit SMR and non-SMR applicants from applying for the same channels in the future. This would have the benefit of establishing a clear demarcation between our allocation of spectrum for SMR and for other Part 90 services and eliminating the risk of SMR encroachment on non-auctionable spectrum allocated for PMRS purposes. We seek comment, however, on how the spectrum should be allocated to address the relative demand for SMR and non-SMR services. One alternative would be to eliminate SMR eligibility for all future licensing on General Category and Pool Channels. Another alternative would be to prohibit future inter-category sharing by SMR applicants on Pool Channels, but to designate a portion of the General Category for SMR-only licensing while the remaining channels would be available only to non-SMR licensees. Finally, if we determine that the demand for additional spectrum by SMR providers is significantly greater than the demand by non-SMR services, a third alternative would be to designate the entire General Category for future licensing exclusively to SMR applicants. We seek comment on these alternatives, and particularly on whether the relative demand for General Category channels by SMR applicants as opposed to non-SMR applicants would justify reclassifying some or all of this spectrum for SMR-only use.

54. In light of our proposal to restrict future SMR use of Pool Channels, and possibly, General Category channels that are designated for non-SMR use, we also tentatively conclude that other Part 90 services should be restricted from future eligibility for licenses on SMR Category channels. We believe that this additional restriction is appropriate not only for purposes of equity but also to ensure that SMR licensees are not required to compete with non-SMR providers for scarce SMR Category channels. We seek comment on our proposal, including whether incumbent SMRs on the General Category or Pool Channels should be allowed to apply for more of these channels.

## E. Licensing Mechanism for 800 MHz SMR Service

55. In the *CMRS Third Report and Order*, we adopted licensing rules and procedures for Part 90 services reclassified as CMRS that are comparable to our rules and procedures for Part 22 services. In the case of 800 MHz SMR service, we determined that we would apply public notice and petition to deny procedures to all applications, and that we would adopt notice and cut-off procedures for accepting applications.[89] In this Further Notice, we set forth proposals for specific application and licensing procedures based on these principles.

### 1. Application Procedures

#### a. *Initial Eligibility*

56. We propose that both existing licensees and new applicants should be eligible for MTA licenses as well as for local licenses in the 800 MHz SMR band. Although we

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[89] *CMRS Third Report and Order*, *supra* note 3, ¶¶ 318, 341.

originally proposed in the *Notice* to restrict initial eligibility for wide-area licenses to applicants who were already licensed within the relevant BTA or MTA,[90] we concluded in the *CMRS Third Report and Order* that because of the intervening grant of authority to use competitive bidding procedures, the initial application process should be open to any qualified applicant.[91] We request comment on this proposal, including whether there is any need to restrict eligibility for MTA licenses to incumbent licensees (or to restrict eligibility based on other criteria) if competitive bidding procedures are used.

*b. Application Procedures for MTA Licenses*

57. For 800 MHz SMR MTA licenses, we propose to use application procedures similar to those used for licensing of PCS. Although MTA licensing in the SMR service may differ from PCS licensing because of the substantial number of pre-existing licensees in the 800 MHz band, we believe similar licensing procedures are appropriate based on the common use of Commission-defined geographic areas and spectrum blocks to define the scope of licenses in both services. We seek comment on this view, and on any alternative procedural approach that commenters may consider appropriate.

(1) Initial Applications

58. In the *CMRS Third Report and Order*, we determined that MTA-based applications in the 800 MHz SMR service would be deemed "initial" applications, even if an applicant is filing for a block that encompasses facilities previously licensed to the applicant.[92] We therefore propose to treat all MTA applicants as initial applicants for public notice, application processing, and competitive bidding purposes, regardless of whether they are already incumbent licensees in the 800 MHz SMR band.[93]

(2) Processing and Procedural Rules

59. As in the case of PCS, we propose to require applicants for MTA-based SMR licenses to file an initial "short-form" application in order to qualify for competitive bidding, after which the successful bidder files a "long form" application. We also propose to adopt rules analogous to our PCS rules with respect to application content, amendment and modification of applications, return of defective applications, waiver procedures, and petitions to deny. Under these proposed procedures, we would announce an initial filing window by

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[90] *Notice*, *supra* note 1, ¶ 24.

[91] *CMRS Third Report and Order*, *supra* note 3, ¶ 341.

[92] *Id.*, ¶ 355.

[93] As discussed below, however, incumbent licensees whose existing operations continue to be regulated as PMRS until 1996 under the grandfathering provisions of the Budget Act will be entitled to similarly grandfather any MTA licenses they may obtain.

public notice for the submission of short-form applications (FCC Form 175) for MTA-block licenses. If only one application is received for an MTA block, the applicant would then file a long-form application (FCC Form 600), which would be placed on public notice for 30 days and would be grantable upon the expiration of the public notice period provided that a petition to deny has not been filed. If more than one short-form application for an MTA block is received, the applications would be considered mutually exclusive and competitive bidding procedures would be employed to select among the applicants. Following the auction, the successful bidder would then file a long-form application, which would be subject to the same 30-day public notice and petition to deny procedures as applications for MTA blocks for which no mutually exclusive application has been filed. We seek comment on these proposed procedures.

(3) Amendments and Modification Applications

60. We propose to allow a limited opportunity for MTA applicants to cure minor defects in their short-form applications, but not to allow major amendments after the expiration of the short-form filing window. These proposals conform to our existing rules for amendment of PCS applications. We also propose to adopt rules regarding major and minor modification of MTA licenses that are consistent with our PCS rules. We note that because MTA-based licensing is based on blocks of spectrum rather than site-specific facilities, MTA licensees will generally not be required to seek major modification of their authorizations other than in the case of assignments or transfers of control. We seek comment on this proposal.

(4) Petitions to Deny

61. As noted above, we concluded in the *CMRS Third Report and Order* that SMR applications would generally be subject to the public notice and petition to deny procedures applicable to Part 22 services.[94] We have also adopted similar procedures in our PCS rules. With respect to MTA-based SMR applications, therefore, we propose to adopt petition to deny procedures comparable to these existing rules. Specifically, any party filing a petition to deny against an SMR applicant will be required to demonstrate standing as a "party in interest" and meet all other applicable filing requirements or its petition will be summarily dismissed.[95] In addition, we intend to adopt "greenmail" restrictions in our SMR rules limiting payments that a petitioner may receive in exchange for agreeing to withdraw a petition. We believe that such restrictions will significantly deter frivolous protests filed primarily for anticompetitive or abusive reasons. We seek comment on these proposed procedures.

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[94] *See* Communications Act, 47 U.S.C. § 309(d).

[95] *See also* Communications Act, 47 U.S.C. §§ 309(j)(5) and (i)(2) (provisions for expedited hearing procedures when substantial and material questions of fact exist regarding an applicant's qualifications).

(5) Subsequent Applications

62. In the event that an MTA block auction winner defaults or an MTA block license is otherwise terminated or revoked, we propose to open a new window for filing of applications for the block by any interested party, and to use competitive bidding in the event that mutually exclusive applications are filed. If a default occurs within five business days after bidding has closed, however, we propose to retain discretion to offer the license to the next highest bidder at its final bid level rather than conducting a new auction. These proposed procedures are consistent with our PCS licensing procedures. We seek comment on our proposal.

c. *Application Procedures for Local SMR Channels*

63. As discussed above, we seek comment on whether local SMR channels should be licensed on a site-specific or area-specific basis. If we adopt area-specific licensing, we believe it would be appropriate to use application procedures similar to those used for the licensing of MTA blocks as discussed *supra*. If, on the other hand, we adopt site-specific licensing for the 80 locally licensed SMR channels, we propose to use application procedures similar to those adopted for non-cellular Part 22 licensees in the *Part 22 Rewrite Order* and *CMRS Third Report and Order*.[96] We propose this approach because these classes of service are similarly licensed on a station-by-station, channel-by-channel basis, and because we determined in the *CMRS Third Report and Order* that they should be subject to comparable licensing procedures. We discuss this option in greater detail below.

(1) Initial Applications

64. To the extent that 800 MHz SMR channels continue to be licensed on a site-specific basis, we must adopt a definition of what constitutes an initial application for a new authorization as opposed to an amendment or a modification of an already-licensed facility. In the *CMRS Third Report and Order*, we stated that we would generally use the same definition of "initial" applications for station-by-station licensing of Part 90 CMRS services as is used in Part 22.[97] Under this definition, an initial application is any application that proposes: (a) a transmitter location anywhere on a new frequency (whether the application is for a new facility or for a new channel to be added to an existing facility), unless the additional channel is for paired two-way operation, is in the same frequency range as the existing channel, and will be operationally integrated with the existing channel; or (b) the location of a facility more than 2 kilometers (1.2 miles) from any existing facility licensed to

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[96] *See* Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, *Report and Order*, released September 9, 1994 (*Part 22 Rewrite Order*), ¶¶ 11-17; *CMRS Third Report and Order*, *supra* note 3, ¶¶ 356-357.

[97] *CMRS Third Report and Order*, *supra* note 3, ¶ 356.

the applicant and operating on the same frequency.[98] Based on our decision in the *CMRS Third Report and Order*, if we adopt site specific rules for local 800 MHz SMR licensing we propose to apply this definition. Thus, all applications for new frequencies or for stations more than 2 kilometers from an existing facility using the same channel would be subject to initial application filing window and competitive bidding procedures as discussed below. We seek comment on this proposal.

(2) Processing and Procedural Rules

65. In the *CMRS Third Report and Order*, we stated that initial applications for site-specific CMRS licenses would be subject to 30-day notice and cutoff procedures for purposes of determining the grouping of mutually exclusive applications. If we adopt site-specific licensing, we therefore propose that all initial applications for the 80 locally licensed SMR channels received during a particular filing window will be reviewed to determine whether they are acceptable for filing, and accepted applications will be placed on public notice for 30 days. Applications would be grantable upon the expiration of the 30-day public notice period provided that (1) no petition to deny has been filed; and (2) the application is not "mutually exclusive" (as defined *infra*) with another pending application. If one or more mutually exclusive initial applications is filed within the public notice period, we propose to use competitive bidding procedures to select the licensee.[99] Following the auction, we would review the application of the auction winner and any petitions to deny filed against the winner's application, after which we would grant or deny the application.

66. In establishing application rules for local SMR licensing, it is particularly important that we develop procedures for identifying and grouping mutually exclusive applications that facilitate efficient processing and licensing. We note that site-specific licensing, unlike area-based licensing, creates particular difficulties in this regard because (1) competing applications for overlapping authorizations must be treated as mutually exclusive, and (2) the cumulative effect of such overlapping applications creates the potential for extended "daisy chains" of mutually exclusive applications.[100] In the *Part 22 Rewrite Order*, we took some steps to address these problems in the licensing of non-cellular Part 22 services. Specifically, we required an applicant who knowingly files a mutually exclusive

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[98] *Id.* As discussed in Section IV(E)(1)(c)(3) *infra*, we seek comment on whether other facility modifications should be classified as major or minor modifications under our rules.

[99] An exception to this rule would occur if an applicant files a modification application that conflicts with the initial application. As we noted in the *CMRS Third Report and Order*, the presence of a modification application (*i.e.*, an application that does not come within the definition of an "initial" application) in the filing group precludes the use of competitive bidding and requires selection to be made by comparative consideration. *CMRS Third Report and Order, supra* note 3, ¶ 366.

[100] By "daisy chain" effect, we mean, for example, Licensee A seeks a license for proposed operations which overlap the service area created by Licensee B's proposed operations, which overlaps the service area created by Licensee C's proposed operations with overlapping service areas continuing *ad infinitum*.

application to limit the scope of the application to the particular channels or facilities that conflict with the competing application.[101] We also provided that the Commission has the discretion to split an application if it contains severable proposals.[102] We propose to adopt these rules for local SMR licensing as well if we adopt site-specific licensing. We seek comment, however, on whether additional measures are also necessary. For example, we ask commenters to address whether use of staggered filing windows for licensing of local channels within specified geographic areas (*e.g.*, in each MTA, BTA, or other specified area) would mitigate the potential daisy chain problem. Under this alternative, we would designate specific areas in which local applications would be accepted, mutually exclusive applications identified, and competitive selections made. Once this process was completed in a designated area, we would then repeat the procedure in adjacent areas. We seek comment on whether establishing separate filing windows for this purpose is practical or beneficial. If we were to adopt this alternative, we request specific comment on (1) what geographic areas should be used for this purpose, and (2) the timing and sequence for opening each such window.

(3) Amendments and Modification Applications

67. In the *CMRS Third Report and Order*, we adopted a definition of what modifications and amendments should be deemed "major" in the context of CMRS services licensed on a site-specific basis.[103] Specifically, we indicated that major modifications include a change in frequency, an increase in the effective radiated power or antenna height above average terrain in any azimuth, or a change in location. We also stated that other changes might be deemed major in particular services depending on their technical and operational characteristics.[104] We seek comment on the applicability of the above definition to locally licensed SMR systems and whether there are other types of modifications that should be deemed major in this context.

68. We also propose to adopt filing window and cutoff procedures for modification applications for the 80 local SMR channels that are consistent with our decision on such procedures in the *CMRS Third Report and Order*. Under this proposal, major modification applications (as opposed to "initial" applications discussed above) would be processed on a first-come, first-served basis, except that (1) modification applications that are mutually exclusive with initial or modification applications filed on the same day would be classified as members of a "same day filing group," and (2) modification applications filed within the 30-day public notice period of a competing initial application would be considered part of the 30-day filing group. In both cases, the mutually exclusive group of applications would be

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[101] 47 CFR § 22.131(b).

[102] *Id.*, § 22.120(a).

[103] *CMRS Third Report and Order, supra* note 3, ¶¶ 356-357.

[104] *Id.*, ¶ 357.

designated for comparative hearing (unless the parties negotiate a legal settlement) because the Budget Act does not permit the use of competitive bidding procedures to determine whether a modification application should be granted. We ask commenters to address whether our proposed definitions and procedures for dealing with modification applications are appropriate for licensing of local SMR channels.

(4) Petitions to Deny

69. We propose to adopt petition to deny procedures with respect to local SMR licensing similar to those proposed above for MTA-based licensing. We seek comment, however, on whether petitions to deny locally licensed SMR applications should be filed within the initial 30-day public notice period following acceptance of such applications, or only after an auction winner has been determined, as is proposed in the case of MTA applications. In either case, we note that we intend to review only petitions filed against the auction winner. We seek comment on this proposed procedure.

2. Regulatory Classification of Licensees

70. In the *CMRS Second Report and Order*, we determined that SMR licensees would be classified as CMRS if they offered interconnected service and as PMRS if they did not offer such service. Under this definition, we anticipate that most if not all MTA licensees will be classified as CMRS because they are likely to provide interconnected service as part of their service offering. For this reason, we propose to classify all MTA licensees presumptively as CMRS providers. This is the same approach we have used with respect to licensing of PCS. Moreover, as in the case of PCS, we propose that MTA applicants or licensees who do not intend to provide CMRS service may overcome this presumption by demonstrating that their service does not fall within the CMRS definition. We also propose not to apply this presumption prior to August 10, 1996 in the case of any MTA licensee who was previously licensed in the SMR service as of August 10, 1993, and is therefore not subject to CMRS regulation for three years from the enactment date under the grandfathering provisions of the Budget Act.[105] We seek comment on the extent to which such regulatory treatment is consistent with the Budget Act, and with the congressional goal of regulatory parity for mobile services that compete with one another. We also seek comment on whether the presumption of CMRS status should apply to licensees authorized for the 80 locally licensed channels.

## F. Competitive Bidding Issues

71. In our *Competitive Bidding Second Report and Order* in PP Docket No. 93-253, we decided to use competitive bidding to choose among mutually exclusive initial applications

[105] *See* Budget Act, § 6002(c)(2)(B). *See also CMRS Second Report and Order*, *supra* note 3. ¶¶ 282-283.

in the CMRS services, including SMR.[106] Since release of our *Competitive Bidding Second Report and Order*, we have adopted competitive bidding procedures for broadband PCS, narrowband PCS, and Interactive Video and Data Service in subsequent orders. With respect to auction rules and procedures for 800 MHz SMR service, however, we believe it is appropriate to seek further public comment on our proposals because, unlike these other services, SMR is an already-existing service with a large number of incumbent licensees. We particularly seek public comment on how to structure competitive bidding procedures that will balance the interests of successful bidders and the operations of existing licensees.

1. Competitive Bidding Design

*a. General Competitive Bidding Principles*

72. The *Competitive Bidding Second Report and Order*, as modified by the *Competitive Bidding Reconsideration Order*, established the criteria to be used in selecting which auction design method to use for each particular auctionable service. Generally, we concluded that awarding licenses to those parties who value them most highly will foster Congress' policy objectives. In this regard, we noted that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum.[107]

73. Based on the foregoing, we concluded that where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding.[108] We also noted, however, that simultaneous multiple round auctions may not be appropriate for all licenses. For example, where there is less interdependence among licenses, there is less benefit to auctioning them simultaneously. Similarly, we explained that when the values of particular licenses to be auctioned are low relative to the costs of conducting a simultaneous multiple round auction, we may consider auction designs that are relatively simple, with low administrative costs and minimal costs to the auction participants.[109]

*b. Competitive Bidding Methodology for 800 MHz SMR Licenses*

74. We believe that multiple bidding methodologies may be required for licensing of

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[106] *Competitive Bidding Second Report and Order*, *supra* note 88, ¶¶ 59-66.

[107] *See Competitive Bidding Second Report and Order*, *supra* note 88, ¶ 70.

[108] *See id.*, ¶¶ 109-111.

[109] *See id.*, ¶¶ 112-113.

800 MHz SMR service. First, we anticipate that the two proposed categories of licenses (MTA-based and local) will vary significantly from one another in terms of expected value and interdependence; therefore, it is unlikely that a single competitive bidding design would be optimal for licensing of both categories. In addition, we believe that competitive bidding in the 800 MHz SMR service presents a number of variables that have not been presented in other services for which auction rules have been developed. In particular, the proposed licensing of local SMR channels on a site-specific basis requires us to examine how competitive bidding would work in a context where mutually exclusive applicants have applied for overlapping rather than identical authorizations. In addition to seeking comment on certain competitive bidding options today, therefore, we reserve the discretion to "design and test multiple alternative methodologies under appropriate circumstances," as Congress authorized us to do in conferring competitive bidding authority.[110]

(1) MTA Licenses

75. We believe that simultaneous multiple round bidding should be the preferred method for licensing of the proposed 800 MHz MTA blocks. Based on the record in the competitive bidding proceeding, as well as our analysis of the Office of Management and Budget and the Congressional Budget Office estimates of total SMR revenues, we expect the proposed MTA licenses to be of sufficient value to warrant the use of simultaneous auctions. We further believe that the value of these MTA licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic regions and because simultaneous multiple round bidding will allow bidders to express the full value of the interdependency among licenses. Moreover, simultaneous multiple round bidding will provide bidders with the opportunity to pursue back-up strategies that enable them most efficiently to obtain the license combinations which satisfy their service needs. Therefore, we tentatively conclude that simultaneous multiple round bidding is most likely to award MTA licenses to bidders who value them the most highly and who are most likely to deploy new 800 MHz SMR technologies and services rapidly, and promote the development of competition for the provision of those and other commercial mobile radio services. We ask commenters to address this tentative conclusion and whether any other competitive bidding designs might be more appropriate for the MTA-based licensing of 800 MHz SMR spectrum, particularly if the number of mutually exclusive applications actually received for MTA blocks suggests that the blocks are not substantially interdependent.

76. Assuming we use simultaneous multiple round auctions for MTA blocks, we also seek comment on which blocks should be auctioned together, the intervals between rounds in each auction, and the sequencing of each auction. The importance of the choice of license groupings increases with the degree of interdependence among the individual licenses or groups of licenses to be auctioned. Grouping interdependent licenses together and putting them up for bid at the same time will facilitate awarding licenses to bidders who value them the most highly by providing bidders with information about the prices of complementary and

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[110] *See* Communications Act, 47 U.S.C. § 309(j)(3).

substitutable licenses during the course of an auction. Based on these principles, our tentative view is that all MTA licenses should be auctioned simultaneously because of the relatively high value and significant interdependence of the licenses. We seek comment on this tentative analysis and on possible alternatives for grouping of licenses.

(2) Local Licenses

77. The use of competitive bidding to resolve mutually exclusive applications for local SMR licenses presents different variables than the use of auctions to select MTA-based licensees. For example, assuming that we license local SMR channels on a site-specific basis, it is likely that the operational costs and complexities of simultaneous multiple round auctions would outweigh their benefits in this context. Similarly, because of the non-contiguous nature of the channels, there does not appear to be a high degree of interdependency among them; and, the limited geographic scope of the licenses is likely to make them less valuable than the licenses for the MTA blocks. We therefore tentatively conclude that a simpler and less costly auction method, such as single round sealed bid auctions, should be used for licensing the 80 local SMR channels. Single round sealed bidding has the principal advantage of being relatively simple for bidders to understand and inexpensive for the FCC to administer and also can generally be completed fairly rapidly. We ask commenters to address this analysis and to suggest alternative bidding designs that might also be appropriate.

78. We also seek comment on how our auction procedures should be structured to facilitate efficient licensing of local SMR channels. For example, if we license these channels on a site-specific basis, the grouping and sequencing of applications for auction purposes may be particularly important to bidders. One alternative would be to allow mutually exclusive applicants to use negotiated settlements or coordination to minimize the number of overlapping applications that would require resolution by competitive bidding. Another alternative would be to divide the local 80 SMR channels into defined geographic areas (*e.g.*, BTAs) and small blocks of channels (*e.g.*, five or ten channels) and conduct a series of separate auctions for mutually exclusive applications within each area/block combination. We seek comment on the practicality of these alternatives. In particular, we ask commenters to address whether these auctions for the local licenses should be conducted separately or simultaneously and how such licenses should be ordered for auction purposes. We also encourage commenters to propose other possible auction designs and procedures if they regard these alternatives as impractical.

*c. Bidding Procedures*

79. We also seek comment on bidding procedures to be used in 800 MHz SMR auctions, including bid increments, duration of bidding rounds, stopping rules, and activity rules. Assuming that we use simultaneous multiple round auctions for MTA-based SMR licenses, we generally propose to use the same or similar bidding procedures to those used in simultaneous multiple round bidding for MTA-based PCS licenses. We seek comment, however, on whether any variations on these procedures should be adopted for MTA-based

licensing in the 800 MHz SMR service. In the case of locally licensed 800 MHz SMR channels, we seek comment on bidding procedures that would be appropriate depending on whether single round sealed bid auctions or an alternative auction methodology is used.

2. Procedural, Payment, and Penalty Issues

80. In the *Competitive Bidding Second Report and Order*, as modified by the *Competitive Bidding Reconsideration Order*, the Commission established general procedural, payment, and penalty rules for auctions, but also that such rules may be modified on a service-specific basis. As discussed below, we generally propose to follow the procedural, payment, and penalty rules established in Subpart Q of Part 1 of the Commission's Rules,[111] but seek comment on whether any service-specific modifications of these rules are needed based on the particular characteristics of the 800 MHz SMR service.

*a. Upfront Payments*

81. As in the case of other auctionable services, we propose to require SMR auction participants to tender in advance to the Commission a substantial upfront payment as a condition of bidding in order to ensure that only serious, qualified bidders participate in auctions and to ensure payment of the penalty (discussed *infra*) in the event of bid withdrawal or default. We seek comment on whether the standard upfront payment formula of $0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates bidding on in any single round of bidding is appropriate for 800 MHz SMR services. We also seek comment on the appropriate minimum upfront payment for 800 SMR applications. In the *Competitive Bidding Second Report and Order*, we established a minimum upfront payment of $2,500, but we also indicated that the minimum amount could be modified on a service-specific basis.[112] We seek comment on whether the standard or some alternative amount is appropriate for the 800 MHz SMR service and whether different amounts should be established for MTA and local licenses.

*b. Down Payment and Full Payment for Licenses Awarded by Competitive Bidding*

82. The *Competitive Bidding Second Report and Order* generally required successful bidders to tender a 20 percent down payment on their bids to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs.[113] We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for

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[111] 47 CFR Part 1, Subpart Q.

[112] *Competitive Bidding Second Report and Order*, *supra* note 88, ¶ 180.

[113] *Competitive Bidding Second Report and Order*, *supra* note 88, ¶¶ 190-192.

the costs of constructing a system, while at the same time not being so onerous as to hinder growth and diminish access. We therefore propose to require that winning bidders for 800 MHz SMR licenses supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). We seek comment on whether this is an appropriate requirement for licensing of this service, and whether 20 percent represents an appropriate level of payment. In addition, we ask commenters to address whether any special provisions, for example a reduced down payment, should be adopted for designated entities, and if so, for which specific categories of designated entities and why.[114]

*c. Bid Withdrawal, Default, and Disqualification*

83. We propose to adopt bid withdrawal, default, and disqualification rules for 800 MHz SMR licensing based on the procedures established in our general competitive bidding rules. Under these procedures, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed, or defaults by failing to remit the required down payment within the prescribed time, would be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if the subsequent winning bid is lower. A defaulting auction winner would be assessed an additional penalty of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. In the event that an auction winner defaults or is otherwise disqualified, we propose to re-auction the license either to existing or new applicants. The Commission would retain discretion, however, to offer the license to the next highest bidder at its final bid level if the default occurs within five business days of the close of bidding. We seek comment on these proposed procedures.

3. Regulatory Safeguards

*a. Unjust Enrichment Provisions*

84. The Budget Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." We therefore propose to adopt the transfer disclosure requirements contained in Section 1.211(a) of our rules for all 800 MHz SMR licenses obtained through the competitive bidding process. In addition, we propose specific rules governing unjust enrichment by designated entities, which are discussed below. Generally, applicants transferring their licenses within three years after the initial license grant will be required to file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. We seek comment on these proposals.

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[114] *See* Section IV(F)(4) *infra*.

*b. Performance Requirements*

85. The Budget Act required the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[115] In the *Competitive Bidding Second Report and Order*, we decided that it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. Our proposed 800 MHz SMR service rules already contain specific performance requirements, such as the requirement to construct within a specific period of time. Thus, we do not propose to adopt any additional performance requirements for competitive bidding purposes. We seek comment on this proposal.

*c. Rules Prohibiting Collusion*

86. In the *Competitive Bidding Second Report and Order*, as modified by the *Competitive Bidding Reconsideration Order*, we adopted special rules prohibiting collusive conduct in the context of competitive bidding.[116] We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. We propose to apply these rules to the 800 MHz SMR service. Under these procedures, bidders will be required to identify on their applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships, or other agreements or understandings that relate to the competitive bidding process. Bidders will also be required to certify that they have not entered into any explicit or implicit agreements, arrangements, or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. We seek comment on the proposal to continue to implement our rules in the *Competitive Bidding Second Report and Order*, as modified by the *Competitive Bidding Reconsideration Order*.

4. Treatment of Designated Entities

*a. Introduction*

87. In authorizing the Commission to use competitive bidding, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in

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[115]Communications Act, 47 U.S.C. § 309(j)(4)(B).

[116]*Competitive Bidding Second Report and Order*, *supra* note 88, ¶¶ 221-226; *Competitive Bidding Reconsideration Order*, *supra* note 88, ¶¶ 50-53.

the provision of spectrum-based services." The statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this congressional goal. In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." Finally, Section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules including lump sums or guaranteed installment payments.

88. In the *Competitive Bidding* docket, we established eligibility criteria and general rules that would govern the award of special provisions for small businesses, rural telephone companies, and minority- and women-owned businesses (collectively, "designated entities"). We also established a menu of possible special provisions that could be awarded to designated entities in particular services, including installment payments, spectrum set-asides, bidding credits, and tax certificates. In addition, we set forth rules to prevent unjust enrichment by designated entities seeking to transfer licenses obtained through use of one of these special provisions.

89. In this Further Notice, we propose specific measures and eligibility criteria for designated entities in the 800 MHz SMR service designed to ensure that such entities are given the opportunity to participate both in the competitive bidding process and in the provision of 800 MHz SMR. We seek comment on these proposals, and specifically on identifying special provisions that are tailored to the unique characteristics of the 800 MHz SMR service and will create meaningful incentives and opportunities in the service for small businesses and businesses owned by minorities and/or women.

*b. Businesses Owned by Women and Minorities*

(1) Specific Special Provisions

90. Based on the list of special provisions for designated entities established in the *Competitive Bidding Second Report and Order*, we propose to utilize bidding credits and a tax certificate program to encourage participation by businesses owned by women and minorities in auctions for the 800 MHz SMR service. Upon consideration and review of the record in the PR 93-144 and PP 93-253 dockets, we tentatively conclude that affording businesses owned by women and minorities bidding credits for 800 MHz SMR licenses is the most cost-effective and efficient means of achieving Congress' objective of ensuring an opportunity for these designated entities to participate in the provision of 800 MHz SMR services, while preserving the advantages of competitive open bidding.

91. Apart from Congress' directive, we believe that ensuring the opportunity for women and minorities to participate in 800 MHz SMR is important for the telecommunications industry. The record in the *Competitive Bidding* docket reflects a severe

underrepresentation of women and minorities in telecommunications.[117] The record in the docket also shows that women and minorities have particular difficulties obtaining capital.[118] Given this history of underrepresentation of minorities and women in telecommunications and the inability of these groups to access financing, we find that the best way we can accomplish the statutory mandate is to provide bidding credits exclusively to minority- and women-owned businesses.

92. In determining the appropriate amount of the bidding credit, we propose to consider several factors. First, our analysis of the market suggests that, because of existing infrastructure and economies of scope, incumbent SMR providers will have the ability to bid more than first-time operators because, in most cases, incumbent providers are able to make use of their existing infrastructure to provide 800 MHz SMR services. Second, we note that very few incumbent SMR providers are minorities or women, so that a substantial discount may be necessary to put these designated entities on equal footing with incumbents. Finally, we consider the bidding credits established for businesses owned by minorities and women in other contexts. For the Interactive Video and Data Service and the nationwide narrowband PCS licenses, the bidding credit afforded to minority- and/or women-owned businesses was 25 percent. For the regional narrowband PCS licenses, we have established a higher bidding credit of 40 percent based on our belief that a 25 percent bidding credit may not provide sufficient opportunity for women- and minority-owned businesses to participate in auctions where the license values are expected to be very high. We seek comment on whether MTA-based SMR licensees are likely to have a similarly high value that would support a 40 percent bidding credit for minority- and women-controlled firms. For the "lower 80" channel licenses, however, given their expected lower value, we propose a bidding credit of 25 percent. We seek comment on the appropriateness of the proposed bidding credits and on whether higher or lower credit amounts should be adopted.

93. To prevent unjust enrichment by women and minorities trafficking in licenses acquired through the use of bidding credits, we propose imposition of a forfeiture requirement on transfers of such licenses to entities that are not owned by women or minorities. Female and minority-owned businesses seeking to transfer a license to an entity that is not owned by women or minorities would be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted. The amount of the penalty would be reduced over time so that a transfer in the first two years of the license term would result in a forfeiture of 100 percent of the value of the bidding credit; in year three of the license term the penalty would be 75 percent; in year four the penalty would be 50 percent and in

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[117] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, adopted June 29, 1994, released July 15, 1994, ¶¶ 103-107 (*Competitive Bidding Fifth Report and Order*).

[118] *Id.* at ¶¶ 98-102. The findings made and discussion in the *Fifth Report and Order* in the *Competitive Bidding* docket on this subject are incorporated here by reference.

year five the penalty would be 25 percent, after which there would be no penalty.

94. We also propose to establish a tax certificate program under which tax certificates would be issued to: (a) non-controlling initial investors in minority and female-owned 800 MHz SMR applicants and licensees, upon the sale of their non-controlling interests; and, (b) 800 MHz SMR licensees who assign or transfer control of their licenses to minority and women-owned entities. In the *Competitive Bidding Second Report and Order*, we observed that tax certificates could be useful as a means of attracting investors to designated entity enterprises and to encourage licensees to assign or transfer control of licenses to designated entities in post-auction transactions. Together with our proposed bidding credits, we believe tax certificates could help to ensure the participation of minority and women-owned businesses in 800 MHz SMR services. By making tax certificates available to non-controlling investors, we anticipate that it will be easier for these designated entities to attract start-up capital because investors will know that they can defer taxes on any gains made when their interests are sold. Similarly, tax certificates can provide incentives to licensees to seek out minority and female buyers in after-market sales because the licensees will be able to defer taxes on profits made in the sale. We seek comment on this proposal as well as on any additional special provisions which may be appropriate for businesses owned by minorities or women in the 800 MHz SMR service.

95. We also propose to impose a one-year holding requirement on the transfer or assignment of 800 MHz SMR licenses obtained through the benefit of tax certificates. As we have noted in other contexts, we believe that rapid resale of such licenses at a profit would subvert our goal of ensuring the opportunity to participate by minority and women-owned businesses, unless the buyer itself is a minority- or women-owned business. Although we do not propose to apply such holding period to assignments or transfers to qualified minority- and women-owned businesses, assignees and transferees obtaining licenses pursuant to this exception would be subject to the one-year holding requirement. We seek comment on the appropriateness and duration of the proposed holding period. In addition, we ask commenters to address whether there should be a different holding period applicable to MTA licenses.

(2) Eligibility Criteria

96. In the *Competitive Bidding Second Report and Order*, we adopted eligibility criteria for businesses desiring to benefit from the established special provisions for designated entities. Specifically, we determined that in order to be deemed a business owned by minorities and/or women, minorities or women must have at least 50.1 percent equity ownership and a 50.1 controlling interest in the designated entity. For limited partnerships, we determined that the general partner must be a minority and/or a woman (or an entity 100 percent owned and controlled by minorities and/or women) that owns at least 50.1 percent of the partnership equity. We also indicated that, for the most part, the interests of minorities and women in designated entities would be calculated on a fully-diluted basis.[119] In the PCS

[119] *Competitive Bidding Second Report and Order*, *supra* note 88, ¶ 277.

context, we established an alternative definition for minority- and female-owned businesses whereby women and/or minority principals control the applicant and own at least 25 percent of the equity and 50.1 percent of the voting stock (in the case of corporations).[120] We seek comment on which of these definitions is most appropriate for purposes of determining designated entity eligibility in the 800 MHz SMR service, or whether we should adopt both definitions in the alternative. We also propose to apply to the 800 MHz SMR applicants the same affiliation and attribution rules for calculating equity and stock ownership that we have previously adopted in the PCS context. We seek comment on this proposal.

*c. Small Businesses*

(1) Specific Special Provisions

97. Based on the list of special provisions for designated entities established in the *Competitive Bidding Second Report and Order*, we seek comment on whether to adopt installment payments for small businesses bidding for 800 MHz SMR licenses. The record in the *Competitive Bidding* proceeding suggests that the most significant barrier for small business participation in the auctioning of 800 MHz SMR spectrum will be access to adequate private financing to ensure their ability to compete against larger firms in the competitive bidding process. In the *Competitive Bidding Second Report and Order*, we concluded that a reduced down payment requirement coupled with installment payments is an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum.[121] We seek comment on whether such a mechanism would be an appropriate special provision for small businesses bidding for 800 MHz SMR licenses, and on whether any additional or alternative special provisions should be provided for small businesses in the 800 MHz SMR context.

98. To ensure that large businesses do not become the unintended beneficiaries of installment payment provisions meant for small businesses, we also propose to make the unjust enrichment provisions adopted in the *Competitive Bidding Second Report and Order* applicable to installment payments by SMR applicants. Specifically, if a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, we will require payment of the remaining principal balance as a condition of the license transfer. We seek comment on this proposal including whether additional unjust enrichment provisions are necessary for the 800 MHz SMR service.

(2) Eligibility Criteria

99. In the *Competitive Bidding Second Report and Order*, we adopted the existing

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[120] *See Competitive Bidding Fifth Report and Order*, *supra* note 116, ¶ 116.

[121] *See Competitive Bidding Second Report and Order*, *supra* note 88, ¶ 238.

SBA net worth/net income size standard as the generic eligibility criteria for small businesses.[122] Under this definition, an entity would qualify as a small business if its net worth is not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million. For broadband PCS, however, we defined a small business as any firm, together with its attributable investors and affiliates, with average gross revenues for the three preceding years not in excess of $40 million, and which does not have an attributable investor or affiliate with a personal net worth of $40 million or more. In the *Competitive Bidding Reconsideration Order*, we concluded that it was more appropriate to define the eligibility requirements for small businesses on a service-specific basis because of the diversity of services that may be subject to competitive bidding and the varied spectrum costs and build-out requirements associated with each service.[123] We contemplated that such an approach would allow us to take into account the capital requirements of each particular service in establishing the appropriate threshold. We therefore seek comment on whether we should utilize the SBA definition initially adopted in the *Competitive Bidding Second Report and Order* or, in the alternative, adopt a gross revenue standard like that used in the broadband PCS context. We ask commenters who believe that a gross revenue standard should be used as the eligibility criteria for small businesses to address the gross revenue threshold appropriate for the 800 MHz SMR context along with any estimates of costs associated with build-out requirements. Based on our past experience with the build-out requirements associated with the 800 SMR service and the already extensive licensing of the service, we believe that the appropriate threshold for the service should be set at a lower level than in broadband PCS. We also propose to apply to the 800 MHz SMR applicants the same affiliation and attribution rules for calculating revenues that we have previously adopted in the PCS context. We seek comment on this proposal.

*d. Rural Telephone Companies*

100. We seek comment on whether we should provide bidding credits or other special provisions for rural telephone companies, but do not propose to adopt such special provisions at this time. First, we note that rural telephone companies, like other wireline carriers, are currently ineligible to hold SMR licenses, although we have proposed to eliminate this restriction.[124] Second, assuming we allow wireline entry into SMR, we question whether special bidding provisions are necessary to ensure the participation of rural telephone companies in the provision of SMR service because of the relatively modest build-out costs involved to serve rural areas. Moreover, in view of the fact that rural telephone companies may use their existing infrastructure to support integrated 800 MHz SMR service in their rural service areas, we anticipate that they will have ample opportunity to participate in 800 MHz

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[122] *Id.*, ¶ 271.

[123] *Competitive Bidding Reconsideration Order*, *supra* note 88, ¶ 145.

[124] *See* Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, GN Docket No. 94-90, *Notice of Proposed Rule Making*, FCC 94-202, adopted August 2, 1994, released August 11, 1994.

SMR. We seek comment on this analysis.

*e. Additional Special Provisions*

101. In addition to the special provisions proposed above for the various classes of designated entities, we seek comment on whether additional special provisions should be adopted that would enhance our goal of ensuring their participation in the competitive bidding process for the 800 MHz SMR service. We request that commenters give particular attention to the alternatives described below.

102. Installment Payments. In the *Competitive Bidding Reconsideration Order*, we indicated that in the future we would not necessarily limit the availability of installment payments to small businesses, but would consider offering the installment option (with varying rates and payment schedules) to other classes of designated entities.[125] We therefore seek comment on whether we should expand eligibility for installment payments to designated entities other than small businesses in the 800 MHz SMR context. Our goal is to ensure that our system of special provisions is designed to match the particular needs and characteristics of eligible recipients. In this respect, it is arguably sufficient to provide installment payments as financial assistance solely to small businesses, which will include small businesses owned by women and minorities and rural telephone companies that meet the small business definition. We seek comment on this analysis.

103. Reduced Upfront Payments. In the *Competitive Bidding Second Report and Order*, we concluded that upfront payment requirements would ensure that bidders are qualified and serious and would provide the Commission with a source of funds in the event of default or bid withdrawal.[126] We also noted that reduced upfront payments may be particularly appropriate for auctions of spectrum specifically set aside for designated entities as a means of encouraging participation in the auction, particularly by all eligible designated entities. As a result, in adopting competitive bidding procedures for broadband PCS, we reduced the upfront payment requirement in the case of designated entities in the entrepreneurs' blocks, observing that requiring full compliance with the upfront payment requirement could discourage auction participation by designated entities. We seek comment on whether there should be a similar reduction in upfront payment for any class of designated entities for any licenses auctioned in the 800 MHz SMR service. We also ask commenters to address whether such reduction should apply to MTA licenses, "lower 80" licenses, or both. In addition, we ask commenters to address the costs and benefits with respect to auction administration and designated entity participation associated with a reduced upfront payment in the 800 SMR service in the absence of a spectrum set-aside.

104. Entrepreneurs' Block. Finally, we seek comment on whether to facilitate

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[125] *Competitive Bidding Reconsideration Order*, *supra* note 88, ¶ 128.

[126] *Competitive Bidding Second Report and Order*, *supra* note 88, ¶¶ 169, 176.

designated entities' participation in the 800 MHz SMR service, we should designate the "lower 80" channels as an "entrepreneurs' block." Even considering the special provisions for designated entities discussed above, we remain concerned in light of our experience with PCS that designated entities may have difficulties competing for 800 MHz SMR licenses against large firms with significant financial resources. We tentatively conclude, however, that it would not be feasible to designate an MTA channel block as an entrepreneur's block because the large number of incumbents already licensed throughout the proposed MTA band make it virtually impossible to identify a particular block that would be suitable. On the other hand, an entrepreneurs' block approach could be more feasible for the "lower 80" channels, which we contemplate will be used primarily, if not exclusively, for operation of local SMR systems. Significantly, these are the type of systems generally operated by smaller companies and, due to their lower build-out requirements, might be more amenable to first-time SMR operators. We seek comment on this analysis. We also ask commenters to address whether some portion of the "lower 80" channels rather than all of them could be designated as an entrepreneurs' block.

105. If we adopt an entrepreneurs' block approach, we also seek comment on how eligibility for the block should be defined. In the first instance, we ask commenters to address whether applicants other than designated entities should be eligible to bid for entrepreneurs' block licenses. In our broadband PCS rules, we required entrepreneurs to comply with financial caps on the assets and gross revenues of the applicant, its affiliates, and major investors. These caps were set at a higher level than the caps for designated entity small businesses, but were nevertheless intended to exclude large, well-financed entities from eligibility. We seek comment on whether the same financial caps should be applied for determining eligibility for SMR entrepreneurs' block licenses. As in the case of our proposed small business definition, we believe that the appropriate threshold for defining entrepreneur eligibility should be set at a lower level than in broadband PCS because of the lower costs associated with SMR development.

106. We also seek comment on how designated entities should be treated within the entrepreneurs' block in terms of eligibility criteria and special provisions. Specifically, we ask commenters to address whether the definitions for small businesses and businesses owned by minorities and/or women should be different for purposes of determining eligibility for the entrepreneurs' block, what specific special provisions should be afforded to designated entities within the entrepreneurs' block, what type of attribution and affiliation rules should apply, and what additional measures are needed to protect against unjust enrichment. We also seek comment on what special provisions designated entities should receive within an entrepreneurs' block. For example, one alternative would be to provide bidding credits to designated entities within the block along the lines of those adopted for PCS, *i.e.*, (a) small businesses receive a 10 percent bidding credit; (b) businesses owned by minorities and women receive a 15 percent bidding credit; and, (c) businesses owned by minorities and women that also qualify as a small business receive a 25 percent bidding credit. In addition, small businesses and minority- and women-owned businesses within an entrepreneurs' block could be afforded an installment payment option combined with reduced upfront payments. We

seek comment on these alternatives and on other special provisions that may be appropriate.

## V. CONCLUSION

107. We adopt this Further Notice of Proposed Rule Making to solicit public comment regarding the accommodation of wide-area Specialized Mobile Radio systems in the 800 MHz band. This Further Notice proposes amendment of Part 90 of our Rules to provide a new licensing mechanism that will facilitate transition to contemporary 800 MHz SMR technologies and services.

## VI. PROCEDURAL MATTERS

### A. Regulatory Flexibility Act

108. An Initial Regulatory Flexibility Analysis is contained in Appendix B to this Further Notice of Proposed Rule Making. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

### B. Ex Parte Rules Non-Restricted Proceeding

109. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR §§ 1.1202, 1.1203, and 1.1206(a).

### C. Comment Dates

110. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415 and 1.419, interested parties may file comments on or before December 5, 1994, and reply comments on or before December 20, 1994. To file formally in this proceeding you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for

public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

**D. Ordering Clause**

111. Authority for issuance of this Further Notice of Proposed Rule Making is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

**E. Contact Person**

112. For further information concerning this proceeding, contact D'wana R. Speight at (202) 632-7125 (Private Radio Bureau, Land Mobile and Microwave Division).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

## PART 90 -- PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

**Authority: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.**

2. Section 90.7 is amended by adding the definitions for "Major Trading Area" following the definition for "Line C" and "MTA license" following the definition for "Mobile station" to read as follows:

**§ 90.7 Definitions**

* * * * *

*Major Trading Areas (MTAs).* A total of 51 licensing regions based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with the following exceptions and additions:

(1) Alaska is separate from the Seattle MTA and is licensed as a single MTA-like area separately.

(2) Guam and Northern Mariana Islands are licensed as a single MTA-like area.

(3) Puerto Rico and the U.S. Virgin Islands are licensed as a single MTA-like area.

(4) American Samoa is licensed as a single MTA-like area.

* * * * *

*MTA-based* or *MTA license.* A license authorizing the right to use a specified block of SMR spectrum within one of the 51 Major Trading Areas.

* * * * *

3. Section 90.609 is amended by adding paragraph (e) to read as follows:

* * * * *

(e) Assignments and transfers of SMR Category stations in the 816-821/861-866 band licensed on or before August 9, 1994, must follow the procedures detailed in Section 90.667.

4. Section 90.617 is amended by revising paragraphs (b), (c), (d), and Table 4A to read as follows:

**§ 90.617 Frequencies in the 809.750-824/854.750-869 MHz, and 896-901/935-940 MHz bands available for trunked or conventional system use in non-border areas.**

* * * * *

(b) The channels listed in Table 2A are available to eligible applicants in the Industrial/Land Transportation Category (consisting of the Power, Petroleum, Forest Products, Film and Video Production, Relay Press, Special Industrial, Manufacturers, Telephone Maintenance, Motor Carrier, Railroad, Taxicab and Automobile Emergency Radio Services). These frequencies are available in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87.0 miles) from the U.S./Canada border. Specialized Mobile Radio Systems (SMRS) will not be authorized on these frequencies.

* * * * *

(c) The channels listed in Table 3A are available to eligible applicants in the Business Radio Category. This category does not include Specialized Mobile Radio Systems as defined in § 90.603(c). These frequencies are available in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87.0 miles) from the U.S./Canada border. Specialized Mobile Radio Systems will not be authorized on these frequencies. These channels are available for inter-category sharing as indicated in § 90.621(g).

* * * * *

(d) The channels listed in Tables 4A and 4B are available only to eligibles in the SMR category which consists of Specialized Mobile Radio (SMR) stations and eligible end users. The frequencies listed in Table 4A are available to SMR eligibles desiring to be authorized on MTA service areas in accordance with Section 90.661. SMR licensees licensed on Channels 400 - 600 on or before August 9, 1994 may continue to utilize these frequencies within their existing service areas. This paragraph deals with the assignment of frequencies only in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87) miles from the U.S./Canada border. See §90.619 for the assignment of SMR frequencies in these border areas. For stations located within 113 km (70 miles) of Chicago, channels 401-600 will be assigned in groups as outlined in Table 4C.

Table 4A--SMR Category 806-821/851-866 MHz Band Channels

MTA-Based SMR Systems

| Group | Spectrum Block |
|---|---|
| A | 816.0000/861.0000 to 817.2500/862.2500 (Channel Nos. 401-450) |
| B | 817.2500/862.2500 to 818.5000/863.5000 (Channel Nos. 451-500) |
| C | 818.5000/863.5000 to 819.7500/864.7500 (Channel Nos. 501-550) |
| D | 819.7500/864.7500 to 821.0000/866.0000 (Channel Nos. 551-600) |

Local Channels[1]

| Group No. | Channel Nos. |
|---|---|
| 201 | 201-241-281-321-361 |
| 202 | 202-242-282-322-362 |
| 203 | 203-243-283-323-363 |
| 204 | 204-244-284-324-364 |
| 205 | 205-245-285-325-365 |
| 206 | 206-246-286-326-366 |
| 207 | 207-247-287-327-367 |
| 208 | 208-248-288-328-368 |
| 221 | 221-261-301-341-381 |
| 222 | 222-262-302-342-382 |
| 223 | 223-263-303-343-383 |
| 224 | 224-264-304-344-384 |
| 225 | 225-265-305-345-385 |
| 226 | 226-266-306-346-386 |
| 227 | 227-267-307-347-387 |
| 228 | 228-268-308-348-388 |

5. Section 90.619 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 90.619 Frequencies available for use in the U.S./Mexico and U.S/Canada border areas.**

(a)* * * * *

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[1]These frequencies are available to SMR eligibles on a local basis.

(3) Tables 2A and 2B list the channels that are available for assignment to eligible applicants in the Industrial/Land Transportation Category (consisting of the Power, Petroleum, Forest Products, Video Production, Relay Press, Special Industrial, Manufacturers, Telephone Maintenance, Motor Carrier, Railroad, Taxicab and Automobile Emergency Radio Services). Specialized Mobile Radio Systems (SMRS) will not be authorized in this category.

* * * * *

(5) Tables 4A and 4B list the channels that are available for assignment for the SMRS Category (consisting of Specialized Mobile Radio Systems (SMRS) as defined in § 90.603(c)). These channels are not available for inter-category sharing.

TABLE 4A - UNITED STATES-MEXICO BORDER AREA, SMRS CATEGORY
806-821/851-866 MHZ BAND (95 CHANNELS):

MTA-Based SMR Category (30 Channels)

| Group | Offset Channel No. |
|---|---|
| A | 429-431-433-435-437-439 |
| B | 469-471-473-475-477-479 |
| C | 509-511-513-515-517-519-549 |
| D | 551-553-555-557-559-589-591-593-595-597-599 |

SMR Category---Local Channels (65 Channels)

| Group | Offset Channel No. |
|---|---|
| 228 | 228-268-308-348-388 |
| 229 | 229-269-309-349-389 |
| 230 | 230-270-310-350-390 |
| 231 | 231-271-311-351-391 |
| 232 | 232-272-312-352-392 |
| 233 | 233-273-313-353-393 |
| 234 | 234-274-314-354-394 |
| 235 | 235-275-315-355-395 |
| 236 | 236-276-316-356-396 |
| 237 | 237-277-317-357-397 |
| 238 | 238-278-318-358-398 |
| 239 | 239-279-319-359-399 |
| 240 | 240-280-320-360-400 |

* * * * *

(b)* * * * *

(8)* * * * *

TABLE 12--SMRS CATEGORY--95 Channels
[Regions 1, 4, 5, 6]

MTA-Based SMR Category (90 Channels)

| Group | Channel No. |
|---|---|
| A | None |
| B | 463 through 480, 493 through 500 |
| C | 501 through 510, 523 through 540 |
| D | 553 through 570, 583 through 600 |

SMR Category---Local Channels (5 Channels)

| Group | Channel No. |
|---|---|
| 30 | 30-60-90-120-150 |

* * * * *

(9)* * * * *

TABLE 16--SMRS CATEGORY--60 Channels
[Region 2]

MTA-Based SMR Category (55 Channels)

| Group | Channel No. |
|---|---|
| A | None |
| B | None |
| C | 518 through 528, 536 through 546 |
| D | 554 through 564, 572 through 582, 590 through 600 |

SMR Category---Local Channels (5 Channels)

| Group | Channel No. |
|---|---|
| 18 | 18-36-54-72-90 |

* * * * *

(10)* * * * *

TABLE 20--SMRS CATEGORY--135 Channels

[Region 3]

MTA-Based SMR Category (120 Channels)

| Group | Channel No. |
|---|---|
| A | 417 through 440 |
| B | 457 through 480, 497 through 500 |
| C | 501 through 520, 537 through 550 |
| D | 551 through 560, 577 through 600 |

SMR Category---Local Channels (15 Channels)

| Group | Channel No. |
|---|---|
| 38 | 38-78-118-158-198 |
| 39 | 39-79-119-159-199 |
| 40 | 40-80-120-160-200 |

* * * * *

(11)* * * * *

TABLE 24--(REGIONS 7, 8) SMRS CATEGORY--190 Channels

MTA-Based SMR Category (80 Channels)

| Group | Channel No. |
|---|---|
| A | 425 through 440 |
| B | 465 through 480 |
| C | 505 through 520, 545 through 550 |
| D | 551 through 560, 585 through 600 |

SMR Category---Local Channels (110 Channels)

| Group | Channel No. |
|---|---|
| 35 | 35-75-115-155-195 |
| 36 | 36-76-116-156-196 |
| 37 | 37-77-117-157-197 |
| 38 | 38-78-118-158-198 |
| 39 | 39-79-119-159-199 |
| 40 | 40-80-120-160-200 |
| 225 | 225-265-305-345-385 |
| 226 | 226-266-306-346-386 |
| 227 | 227-267-307-347-387 |
| 228 | 228-268-308-348-388 |
| 229 | 229-269-309-349-389 |
| 230 | 230-270-310-350-390 |
| 231 | 231-271-311-351-391 |
| 232 | 232-272-312-352-392 |
| 233 | 233-273-313-353-393 |
| 234 | 234-274-314-354-394 |
| 235 | 235-275-315-355-395 |
| 236 | 236-276-316-356-396 |
| 237 | 237-277-317-357-397 |
| 238 | 238-278-318-358-398 |
| 239 | 239-279-319-359-399 |
| 240 | 240-280-320-360-400 |

* * * * *

6. Section 90.621 is amended by revising paragraph (g) to read as follows:

**§ 90.621 Selection and assignment of frequencies.**

* * * * *

(g)* * * * *

(2) Channels in the Industrial/Land Transportation and Business categories will not be available to SMR systems for inter-category sharing.

* * * * *

(4) Channels in the SMRS category will not be available to Industrial/Land Transportation and Business category systems for inter-category sharing.

* * * * *

7. Section 90.629 is amended by adding a new paragraph (e) to read as follows:

**§ 90.629 Extended implementation period.**

* * * * *

(e) SMR Systems licensed after August 9, 1994 will not be eligible for extended implementation periods under this section.

8. Subpart S is amended by adding a new heading following Section 90.659 to read as follows:

**POLICIES GOVERNING THE LICENSING AND USE OF MTA-BASED SMR SYSTEMS IN THE 816-821/861-866 BAND.**

9. A new section 90.661 is added to Subpart S to read as follows:

**§ 90.661 MTA-based SMR Service Areas.**

MTA licenses for SMR spectrum blocks in the 816-821/861-866 band listed in Table 4A of Section 90.617(d) are available in 51 Major Trading Areas (MTAs) as defined in Section 90.7.

10. A new Section 90.663 is added to Subpart S to read as follows:

**§ 90.663 MTA-Based SMR System Operations.**

(a) MTA-based licensees authorized in the 816-821/861-866 MHz band pursuant to Section 90.661 may construct and operate base stations using any frequency identified in their spectrum block anywhere within their authorized MTA, provided that:

(1) The MTA licensee affords protection, in accordance with §90.621(b), to all previously authorized co-channel stations that are not associated with another MTA license.

(2) The MTA licensee complies with any rules and international agreements that restrict use of frequencies identified in their spectrum block, including the provisions of Section 90.619 relating to U.S./Canadian and U.S./Mexican border areas.

(3) The MTA licensee limits its field strength at any location on the border of the MTA service area in accordance with §90.771.

(b) In the event that the authorization for a previously authorized co-channel station within the MTA licensee's authorized spectrum block is terminated or revoked, the MTA licensee's co-channel obligations to such station will cease upon deletion of the facility from the Commission's licensing record. The MTA licensee then will be able to construct and operate base stations using such frequency.

11. A new Section 90.665 is added to Subpart S to read as follows:

**§ 90.665 Authorization, Construction and Implementation of MTA Licenses.**

(a) MTA licenses in the 816-821/861-866 MHz band will be issued for a term not to exceed ten years.

(b) MTA licensees in the 816-821/861-866 band will be permitted five years to construct their stations. This five-year period will commence with the issuance of the MTA-wide authorization and will apply to all of the licensee's stations within the MTA spectrum block, including any stations that may have been subject to an earlier construction deadline arising from a pre-existing authorization.

(c) MTA licensees in the 816-821/861-866 MHz band must, within three years, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA. Further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA within five years.

12. A new Section 90.667 is added to Subpart S to read as follows:

**§ 90.667 Special provisions regarding assignments and transfers of authorizations for incumbent SMR licensees in the 816-821/861-866 MHz band.**

An SMR licensee initially authorized on any of the channels listed in Table 4A of Section 90.617 on or before August 9, 1994 may transfer or assign its channel(s) to another entity subject to the provisions of Sections 90.153 and 90.609(b). If the proposed transferee or assignee is the MTA licensee for the spectrum block to which the channel is allocated, such transfer or assignment presumptively will be deemed to be in the public interest.

13. A new Section 90.771 is added to Subpart S to read as follows:

**§ 90.771 Field Strength Limits**

The predicted or measured field strength at any location on the border of the MTA service area for MTA licensees shall not exceed 22 dBuV/m unless all bordering MTA licensees agree to a higher field strength. In the event that this standard conflicts with the MTA licensee's obligation to provide co-channel protection to incumbent licensees under Section 90.621(b), the requirements of Section 90.621(b) shall prevail.

## APPENDIX B

## INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this Further Notice of Proposed Rule Making. Written public comments are requested on the IRFA.

***Reason for Action***: This rule making proceeding was initiated to secure comment on proposals for establishing a flexible regulatory scheme for the 800 MHz Specialized Mobile Radio (SMR) service that would promote efficient licensing and enhance the service's competitive potential in the commercial mobile radio marketplace. The proposals advanced in the Further Notice of Proposed Rule Making are also designed to implement Congress's goal of regulatory symmetry in the regulation of competing commercial mobile radio services as described in Sections 3(n) and 332 of the Communications Act, 47 U.S.C. §§ 153(n), 332, as amended by Title VI of the Omnibus Budget Reconciliation Act of 1993 (Budget Act). The Commission also seeks to adopt rules regarding competitive bidding in the 800 MHz SMR service based on Section 309(j) of the Communications Act, 47 U.S.C. § 309(J), which delegates authority to the Commission to use auctions to select among mutually exclusive initial applications in certain services, including 800 MHz SMR.

***Objectives***: The Commission proposes changes to its rules for the 800 MHz SMR service that are intended to promote the growth of both traditional local SMR service and emerging wide-area SMR services, and to enhance the ability of all SMR providers to compete in the larger commercial mobile services market. Specifically, the Commission seeks to designate a block of contiguous spectrum in the 800 MHz SMR band for licensing to wide-area systems to enable them to use innovative wideband technologies and compete more effectively against Personal Communications Services and cellular, which also use contiguous spectrum. The Commission proposes to license non-contiguous spectrum in the 800 MHz SMR band on a local basis to provide opportunities for smaller SMR systems that seek to provide local niche services. It also seeks to encourage more efficient use of spectrum in congested areas and to accommodate technologically advanced systems. Finally, the Further Notice of Proposed Rule Making seeks to establish a new licensing mechanism for the 800 MHz SMR service that will significantly streamline the processing of applications, reducing the administrative burden for both applicants and the Commission.

***Legal Basis***: The proposed action is authorized under the Budget Act. Pub. L. No. 103-66, Title VI, §6002, and Sections 2(a), 3(n), 4(i), 302, 303(g), 303(r), 309(i), 309(j), 332(a), 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 152(a), 153(n), 154(i), 302, 303(g), 303(r), 309(i), 309(j), 332(a), 332(c) and 332(d), as amended.

***Reporting, Recordkeeping, and Other Compliance Requirements***: Under the proposal contained in the Further Notice of Proposed Rule Making, SMR licensees who obtain MTA-based licenses may be required to report information regarding location of their facilities and

coverage of their service areas. SMR applicants seeking treatment as "designated entities" may also be subject to reporting and recordkeeping requirements to demonstrate compliance with our competitive bidding rules.

***Federal Rules Which Overlap, Duplicate or Conflict With These Rules:*** None.

***Description, Potential Impact, and Number of Small Entities Involved:*** The Further Notice of Proposed Rule Making potentially affects numerous small entities already operating 800 MHz SMR systems on frequencies that would be designated for licensing on a wide-area basis. The Further Notice of Proposed Rule Making tentatively concludes that existing licensees on these frequencies should be allowed to continue operating under their existing authorizations, but also seeks to encourage voluntary frequency transfers or other arrangements to allow for efficient spectrum use. The competitive bidding proposals contained in the Further Notice of Proposed Rule Making also could affect small entities seeking initial licenses in the 800 MHz SMR service. The Further Notice of Proposed Rule Making proposes special provisions in the Commission's auction rules to benefit "designated entity" applicants, including small businesses. After evaluating comments filed in response to the Further Notice of Proposed Rule Making, the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

***Significant Alternatives Minimizing the Impact on small Entities Consistent with the Stated Objectives:*** This Further Notice of Proposed Rule Making solicits comment on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

***IRFA Comments:*** We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 110 of this Further Notice of Proposed Rule Making.

## APPENDIX C

## LIST OF PLEADINGS IN PR DOCKET No. 93-144

### COMMENTS

American Mobile Telecommunications Association, Inc. (AMTA)
Associated Public-Safety Communications Officers, Inc.
Bell Atlantic Enterprises International
Council of Independent Communications Suppliers
Dial Page, Inc. (Dial Page)
E. F. Johnson Company
Fleet Call, Inc. (Nextel, due to corporate name change)
GTE Service Corp.
National Association of Business and Educational Radio (NABER)
PacTel Paging
PowerSpectrum, Inc.
Radiofone, Inc.
Southwestern Bell Corporation (SBC)
Utilities Telecommunications Council

### REPLY COMMENTS

Advanced Mobilecomm, Inc.
AMTA
Courtesy Communications, Inc.
GTE Service Corp.
NABER
Nextel
PacTel Paging
Questar Telecom, Inc. (Questar)
Mitchell E. Shipman
The Southern Company
SBC
United States Telephone Association
Utilities Telecommunications Council

## APPENDIX D

## LIST OF PLEADINGS IN GN DOCKET No. 93-252

### COMMENTS

Air Spectrum III, Inc.
AirTouch Communications
AirTouch Paging and Arch Communications Group, Inc.
American Mobile Satellite Corporation
American Mobile Telecommunications Association, Inc. (AMTA)
American Personal Communications
American Petroleum Institute
Bell Atlantic Companies
BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., BellSouth Wireless, Inc., Mobile Communications Corp. of America
Brown and Schwaninger, Jr.
Cellular Telecommunications Industry Association
Celpage, Inc.
Century Cellunet, Inc.
Comcast Corp.
Committee for Effective Cellular Rules
Constellation Communications, Inc.
Dial Page, Inc. (Dial Page)
E.F. Johnson Company
The Ericsson Corporation
Geotek Communications, Inc.
Global Cellular Communications, Inc., and Jean M. Warren
GTE Service Corporation
Industrial Telecommunications Association, Inc. and Council of Independent Communication Suppliers
LegalCom Services, Inc.
Loral/Qualcomm Partnership, L.P.
McCaw Cellular Communications, Inc.
Metrocall, Inc.
Motorola, Inc.
National Association of Business and Educational Radio, Inc. (NABER)
Network USA
Nextel Communications, Inc. (Nextel)
New Par
NYNEX Corporation
Omnipoint Communications, Inc.
OneComm Corporation
Pagemart, Inc.

Paging Network, Inc.
PCC Management Corporation
Personal Communications Industry Association
Pittencrieff Communications, Inc. (Pittencrieff)
RAM Mobile Data USA Limited Partnership
RAM Technologies, Inc.
The RF Technologies Group, Police Emergency Radio Services, Inc.
Roseville Telephone Company
Rural Cellular Association
Russ Miller Rental
SEA, Inc.
Simrom, Inc.
SmartLink Development Limited Partnership
SMR Systems, Inc.
The Southern Company
Southwestern Bell Corporation (SBC)
Sprint Corporation
SunCom Mobile and Data, Inc.
TRW Inc.
United States Sugar Corporation (US Sugar)
US MobilComm, Inc.
US West, Inc.
Utilities Telecommunications Council
Vanguard Cellular Systems, Inc.
WJG Maritel Corporation

**REPLY COMMENTS**

American Paging, Inc.
American Radio, Professional Communications, Mobile Phones of Cordele/Net Link Communications, Range Telecommunications, Leischner Electric, Southern Minnesota Communications, B & M Communications, Le FLore Communications, Advanced Communications Services, Inc., Mobile Phone of Texas, Communications Works
AMTA
AirTouch Paging and Arch Communications Group, Inc.
American Petroleum Institute
Applied Technology Group, Inc.
Atlantic Cellular Company
Banks Tower Communications Ltd.
Bell Atlantic Companies
Carver, August Bert t/a Action Radio
CellCall, Inc.

Comcast Corp.
Comsat Mobile Communications
Cook, Don
Dial Page
Dru Jenkinson, Inc., Tad Dobbs, Inc., Shelly Curttright, Inc.. Jana Green, Inc., Joan Moore, Inc.
Eden Communications, Inc.
E.F. Johnson Company
The Ericsson Corporation
Fetterman, Robert d/b/a RF Communications (Fetterman)
Fresno Mobile Radio, Inc.
Geotek Communications, Inc.
Global Cellular Communications, Inc., and Jean M. Warren
Industrial Telecommunications Association, Inc., Alliance of Private 800/900 MHz Licensees (ITA/Alliance of Private 800/900 MHz Licensees)
JMTV, Inc., Jean D. Murphy (JMTV, Inc.)
Joriga Electronics, Inc.
Kay, James A., Jr.
Lausman, Kevin d/b/a Communications Service Center
Luczak, Thomas
Madera Radio Dispatch, Inc.
McCaw Cellular Communications, Inc.
Mobile U.H.F., Inc.
Motorola, Inc.
NABER
National Telephone Cooperative Association
Nextel
Northwest Wireless Network, L.L.C.
OneComm Corporation
O'Neil TV, Inc., Mary O. McDonnel
Pacific Bell and Nevada Bell
Paging Network, Inc.
PCC Management Corporation
Personal Communications Industry Association
Pittencrieff
Puerto Rico Telephone Company
Qualicom Systems, Inc.
Radiofone, Inc.
RAM Mobile Data USA Limited Partnership
The RF Technologies Group, Police Emergency Radio Services, Inc.
RMTV, Inc., Roy J. Murphy (RMTV, Inc.)
Rural Cellular Association
Russ Miller Rental
SEA, Inc.

Sobel, Mark d/b/a Airwave Communications
Southeastern SMR Association, Idaho Communications Limited
Partnership, Teton Communications Inc., South Carolina Communications Limited
Partnership, Advanced Electronics,East Texas Communications Limited Partnership,
John Mitchell Company (Southeastern SMR Association)
The Southern Company
SBC
Speed-Net, Parkinson Electronics Company, Bill Wayne d/b/a
Mr. Radio, Refiled Communications, Inc. and Dale Walsh d/b/a The Walsh Group
Sprint Corporation
Spruill, C.T.
Stalvey, Rod d/b/a Stalvey Communications
Suncom Mobile and Data, Inc.
T&K Communications Systems, Inc.
TelSA, Inc.
Triangle Communications, Inc.
Uniden America Corporation
USITV, Inc. and Hunter ITV, Inc. (USITV/Hunter)
US MobilComm, Inc.
US Sugar
US West, Inc.

**Separate Statement**

**of**

**Commissioner James H. Quello**

***Re:*** ***Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band (GN Docket No. 93-144, RM-8117, 8029, and 8030), and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 800 MHz SMR (PP Docket No. 93-253)***

As a four-term Commissioner and former Chairman of the Federal Communications Commission, I have always followed and encouraged the development of Private Radio services with particular interest. The industries that comprise what has been classified previously as "private radio" are the success stories of the regulatory policies of the Federal Communications Commission. During the current period of transition from Private Radio to Commercial Mobile Radio Services, we need to be fair and flexible in proposing new rules and procedures and, equally important, in the treatment of existing licensees.

This Further Notice of Proposed Rule Making proposes to make 800 MHz Specialized Mobile Radio (SMR) licenses subject to competitive bidding, that is, auctions. The revised rules governing the provision of mobile communications services in the 800 MHz band that we propose today devolve from the central goal of using auctions to issue licenses. Some suggest that we should use auctions whenever possible. I want to clarify, however, that I believe we should employ auctions only where permitted under the statutory precepts AND only if such use is in the public interest. Moreover, I want to reiterate what is a foundational principle but often overlooked in the pursuit of auction fever, *viz.*, that auctions are a licensing methodology and not a spectrum management tool. We confuse the one for the other at our peril, and, perhaps more importantly, at the peril of the industries over which this Commission has jurisdiction.

The proposals set forth in this NPRM are highly detailed, *e.g.*, licensing of non-contiguous channels. I ask the commentors to respond to these proposals in the context of the current state of the development and deployment of 800 MHz SMR services.

Specifically, the FCC froze all pending applications in this service because of the desire to auction the spectrum. Unfortunately, we had approximately between 40,000 and 50,000 applications -- most of which, I am told, were routine. The SMR industry has generously offered to assist the Commission in processing the pending applications. It is not until the backlog is cleared that we will be able to determine whether an auction is feasible.

Clearly, this Further NPRM implements the desire to employ competitive bidding as the preferred licensing method for 800 MHz SMR services in the future. The problem is that we are unsure if there will be anything left to auction once the pending 40,000-plus applications are processed. Accordingly, this item proposes rules that may never be used because there may be nothing left to auction once the industry is finished assisting Gettysburg in processing the tremendous backlog. Nevertheless, we might as well have rules in place in the event that some available unlicensed spectrum is identified.

I seek comment in this regard on these proposals.